Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

WHITE WING DEVELOPMENT, INC.,
a California corporation,
DBA WHITE WING ASSOCIATES,
Petitioner,
vs.
COUNTY OF SOLANO,
BOARD OF SUPERVISORS OF THE COUNTY OF SOLANO,
PLANNING COMMISSION OF THE COUNTY OF SOLANO,
Respondents.

On Petition for Writ of Certiorari
To The California Court of Appeal

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a county land-use regulation mandating the use of a sewage disposal method that endangers the public health and welfare effect a taking of property in violation of the Fifth and Fourteenth Amendments, by failing substantially to advance a legitimate state interest?

2. Is a landowner's taking claim based on such regulation ripe for decision when the county has denied the landowner's application for amendment of the regulation, or exemption from it, and the state courts have upheld the denial?

3. Does the constitutional separation of powers prevent a court from granting the landowner effective relief against the regulation?

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding in the California Court of Appeal. Petitioner, WHITE WING DEVELOPMENT, INC., a California corporation dba White Wing Associates, has no parent companies or nonwholly owned subsidiaries.

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On Petition for Writ of Certiorari
To The California Court of Appeal

PETITION FOR WRIT OF CERTIORARI

Petitioner WHITE WING DEVELOPMENT, INC., a California corporation dba White Wing Associates ("White Wing"), petitions for a writ of certiorari to review the order of the California Court of Appeal, First Appellate District, Division One, affirming the judgment of the California Superior Court dismissing White Wing's Verified Petition for Writ of Mandate. The California Supreme Court denied White Wing's petition for review and there are no other

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Note: In all quoted material, footnotes are omitted and emphasis is ours unless otherwise stated.

avenues for review of the judgment or order within the California court system.

OPINION BELOW

The unpublished decision of the California Court of Appeal, dated July 10, 1996, the order of the California Supreme Court denying review, dated October 16, 1996, and the judgment of the California Superior Court, dated November 13, 1995, are set forth as Appendices A, B and C, respectively, to this petition.

JURISDICTION

This Court has jurisdiction to review the order of the California Court of Appeal by writ of certiorari pursuant to 28 U.S.C. Section 1257(a). The Court of Appeal is the highest court of California in which a decision in this case could be had, and White Wing has claimed rights and privileges under the United States Constitution which the California courts have denied. This petition is filed within 90 days after entry of the order of the California Supreme Court denying review, and is timely under Rule 13.1 of the Rules of this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth and Fourteenth Amendments to the United States Constitution, the relevant portions of which are as follows:

Fifth Amendment

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

A. FACTS MATERIAL TO QUESTIONS PRESENTED[1]

White Wing owns 1220 acres of undeveloped land (the "Property")[2] in the northwestern portion of the

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[1]This petition seeks review of an order affirming a judgment of dismissal by the California Superior Court, after that Court sustained a demurrer to White Wing's Verified Petition for Writ of Mandate and Complaint for Declaratory Relief and Damages ("Verified Petition"). The Verified Petition is set forth in its entirety as Appendix D to this petition. The function of a demurrer under California law is substantially the same as that of a motion to dismiss under F. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. In ruling on a demurrer, or on appeal from a judgment sustaining a demurrer, the court must assume the truth of all material facts properly pleaded, without regard to possible difficulties of proof. *Perdue v. Crocker National Bank*, 38 Cal. 3d 913, 922, 702 P.2d 503, 509, 216 Cal. Rptr. 345, 351 (1985); *Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal. 3d 197, 213-214, 673 P.2d 660, 670-671, 197 Cal. Rptr. 783, 793-794 (1983). A demurrer must be overruled if the pleading states a cognizable claim on *any* legal theory, even if the pleader has demanded the wrong form of relief on the facts alleged. *Gruenberg v. Aetna Insurance Co.*, 9 Cal. 3d 566, 572, 510 P.2d 1032, 1036, 108 Cal. Rptr. 480, 484 (1973); *Selby Realty Co. v. City of San Buenaventura*, 10 Cal. 3d 110, 123, 514 P.2d 111, 119, 109 Cal. Rptr. 799, 807 (1973). Accordingly, the facts set forth in this petition are those properly pleaded by White Wing in its Verified Petition, together with the general plan of respondent County of Solano and related materials of which the California Court of Appeal took judicial notice. (See Appendix A at 10 n.5).

[2]White Wing's entire property comprises approximately 1580 acres. The eastern portion of the property, designated "extensive agriculture" under respondents' general plan, is not involved in this proceeding.

unincorporated area of respondent County of Solano ("County").[3](Appendix D at 5-7).[4] The Property is designated "Very Low-Density Rural Residential/Planned Unit Development," at a density of 1 dwelling unit per 2 acres (.5 units per acre), under the West Central Solano County General Plan ("WCGP"), a portion of County's general plan[5] adopted in 1975. (*Id.* at 6). The Property is also designated "Rural Residential," with a minimum building site area of 2.5 acres and a density of one unit per 2.5 to 10 acres, under the Land Use and Circulation Element ("LUCE"), another portion of County's general plan adopted in 1980. (*Id.* at 7).[6]

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[3]Respondents are the County, its Board of Supervisors, which as the County's legislative body is empowered to adopt or amend its general plan, and its Planning Commission, which is charged with making recommendations to the Board of Supervisors with regard to such adoption or amendment.

[4]The Verified Petition (Appendix D) is also included as pages 1-43 of the 109-page Appellant's Appendix in Lieu of Clerk's Transcript in the California Court of Appeal. We cite to that document as "CT" herein.

[5]California law requires the legislative body of each county and city to adopt "a comprehensive, long-term general plan for the physical development of the county or city...." Calif. Gov't Code § 65300. The general plan must include *inter alia* "a statement of development policies" and "a land use element which ... shall include a statement of the standards of population density and building intensity recommended for the various districts and other territory covered by the plan." *Id.*, § 65302(a). See generally *DeVita v. County of Napa*, 9 Cal. 4th 763, 772-774, 889 P.2d 1019, 1024-1025, 38 Cal. Rptr. 2d 699, 704-705 (1995).

[6]California law requires that the general plan "comprise an integrated, internally consistent and compatible statement of policies...." Calif. Gov't C. § 65300.5; see, *e.g.*, *Garat v. City of Riverside*, 2 Cal. App. 4th 259, 285-287, 3 Cal. Rptr. 2d 504, 519-522 (1991). The conflicting density standards for the Property in the WCGP and the LUCE violate this requirement for internal consistency; however, that violation is not the subject of the present petition.

In 1984, the voters of County adopted Proposition A (Ordinance No. 1220), which requires an affirmative vote of the electorate before lands designated for agriculture or open space under County's general plan can be redesignated for residential development. (Appendix D at 8). In 1994, respondent Board of Supervisors (the "Board") extended the expiration date of Proposition A from 1995 to the year 2010. (*Ibid.*). The Property is not subject to Proposition A, however, by virtue of its designation for low-density residential development under the WCGP and the LUCE at the time Proposition A was adopted. (Appendix D at 8). Thus, it remains the only large contiguous tract of undeveloped land in County that is both suitable and available for residential development. (*Id.* at 8, 19).

County's general plan requires that all new development in the unincorporated area be served by individual septic systems for sewage disposal. The plan prohibits connections to a public treatment facility in that area. The LUCE, a part of the general plan, provides as follows:

> SEWER SERVICE
>
> It is the intent of this plan to confine new development requiring public sewer service to areas which are located within incorporated cities. All of the future development in the unincorporated area should be self-sufficient with on-site sewage disposal systems as approved by the County Health Department.

(Brief of Amici Curiae to California Court of Appeal, Exhibit A at A-16)[7]

The foregoing provision, and the 2.5 acre minimum building site area also required by the LUCE, originated in the

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[7]Exhibit A to the Brief of Amici Curiae consists of a staff report to the Board of Supervisors of which the Court of Appeal took judicial notice. (See Appendix A at 10 n.5).

provisions of County's Septic Tank Regulations adopted in 1976. Those regulations fixed 2.5 acres as the minimum size of residential lots served by septic tank disposal systems and a public water supply. (Appendix D at 7; Appendix A at 3).

In April 1990, White Wing's predecessor filed applications[8] with respondents for general plan amendments and rezoning[9] to permit residential and golf course development[10] of the Property. (Appendix D at 8-9). In December 1993, the Board certified the accuracy, adequacy and completeness of an environmental impact report ("EIR"), prepared by County under the California Environmental Quality Act ("CEQA"). (Appendix D at 11).[11] The certified EIR recognized the environmental superiority of a central sewage treatment facility over individual septic systems for the White Wing Property. The EIR also concluded that permitting a central treatment facility would not set a precedent for other rural residential development in the County due to the Property's unique status under Proposition A and its long-standing designation under the WCGP for planned-unit development (PUD) low-density residential use. (Appendix D at 13, 18-19, 29).

County's mandate of individual septic systems as the exclusive method of sewage disposal in the area of the

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[8]White Wing subsequently acquired the Property and revised the applications before they were presented to respondents in 1995.

[9]The rezoning application was not brought before respondents and is not at issue in this proceeding.

[10]White Wing did not seek review in the California courts of respondents' actions on its proposal for golf course development, and those actions are not at issue in this proceeding.

[11]CEQA (California Public Resources Code §§ 21000 *et seq.*) requires that a public agency certify the completion of an EIR on any project it proposes to carry out that may have a significant effect on the environment. (§ 21100(a)).

Property has led to pollution of groundwater and surface water resources that poses a serious threat to public health. (Appendix D at 16). Fecal coliform levels in excess of State public health standards exist in both surface drainage and groundwater, and are the direct result of failures of the septic systems mandated by County in nearby residential developments. (*Ibid.*). These developments equal or exceed the residential density of the development proposed by White Wing in this case. (Appendix D at 6).

Septic systems require close monitoring and maintenance to assure their successful operation and to avoid periodic failures. (Appendix D at 15). Nevertheless, lot owners commonly neglect to perform the necessary maintenance for economic or other reasons. (*Id.* at 16). Although fully aware of these facts, County has not had a monitoring program in place to detect septic system failures for 10 years, and admits that it lacks the capability to do so. (*Id.* at 16, 25). Recognizing its incapacity, County recently deleted all provisions for septic tank and leachfield monitoring from its public health ordinances. (*Id.* at 16).

Central wastewater treatment plants are designed to avoid these threats to public health. They provide a higher level of wastewater treatment than septic systems, and must meet rigorous operating standards set by state and regional pollution control authorities. They require construction and operating permits, and are subject to continuous monitoring requirements. (Appendix D at 17).

Septic systems defeat the goal of water conservation by precluding the reclamation and reuse of treated wastewater — a vital consideration in a populous State with a great scarcity of water resources.[12] Septic systems also

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[12] The California Legislature has recognized that water conservation is of "fundamental importance to the prosperity and welfare of the people of the state," and that "conservation of available water resources

produce toxic sludge that must be removed and properly disposed of at a permitted offsite landfill. (Appendix D at 16, 21).[13]

County recognized the inherent deficiencies of septic systems and the environmental superiority of a central treatment facility in reviewing a previous application for development in the vicinity of the Property. In 1984, County approved and entered into a development agreement[14] for Rancho Solano, a rural residential development then located in County's unincorporated area, providing for a central wastewater treatment facility. (Appendix D at 19-20).[15] The

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requires the maximum reuse of reclaimed water in the satisfaction of requirements for beneficial use of water." California Public Resources Code § 9001(a); California Water Code § 13511; see also California Water Code §§ 100, 461, 13512, 13576.

[13]The California courts have explicitly recognized that septic systems are the cause of severe public health problems. In *Heninger v. Board of Supervisors*, 186 Cal. App. 3d 601, 608, 231 Cal. Rptr. 11, 15 (1986), the Court of Appeal noted that "the history of conventional septic tank use in Santa Clara County, as revealed in the county's general plan, is one of environmental degradation, both through outright failures of systems and through mere 'over concentrations of septic systems.' " In *Fallen Leaf Protection Association v. State of California*, 46 Cal. App. 3d 816, 120 Cal. Rptr. 538 (1975), another Division of the Court of Appeal upheld a statute finding the continued use of septic systems in the Lake Tahoe Basin to be a *public nuisance* and requiring all wastes to be collected in sewers and transported to a central treatment facility.

[14]California law (California Government Code §§ 65864 *et seq.*) authorizes a county to enter into a development agreement with a property owner, providing for development in accordance with the county's rules, regulations and official policies in force at the time of the agreement. (§§ 65865(a), 65865.2, 65866). The development agreement is enforceable according to its terms, notwithstanding later changes in the county's general plan, zoning ordinance or other land-use regulations. (§ 65865.4).

[15]The Verified Petition mistakenly states that the development agreement was entered into in 1988, but the actual date is 1984. See

Board approved the development agreement based on an EIR that, like the EIR on White Wing's proposal, documented the technological superiority of such a facility. (*Id.* at 19-20, 21-22).

White Wing's applications, as presented to the Board of Supervisors for decision in July 1995, requested general plan amendments to allow development of 598 single-family residential lots, served by an on-site public wastewater treatment facility to be constructed at White Wing's expense.[16] (Appendix D at 20; Brief of Amici Curiae to California Court of Appeal, Exhibit A at A-7). The requested density of development conformed to the one unit per two-acre designation of the Property in the WCGP.[17]

Appellant's Reply to Brief of Amici Curiae to California Court of Appeal, Exhibit B.

[16] White Wing's requested amendments included the following addition to respondent's sewer service policy quoted in the text at p. 5, *supra*:

> "In the rural residential area designated PUD (.5) by the West Central Solano County General Plan, public sewage disposal facilities provided and managed through a public agency may be allowed as part of a Policy Plan Overlay (PP) District given on-site limitations to establishing septic systems."

(See Brief of Amici Curiae to California Court of Appeal, Exhibit A at A-16). Because the Property is the *only* undeveloped property located "in the rural residential area designated PUD (.5) by the West Central Solano County General Plan," the requested amendment applied *only* to the Property and did not alter County's policy with respect to any other property.

[17] Consistent with its request for approval of a central sewage treatment facility, White Wing also requested elimination of the conflicting density designation in the LUCE based on minimum lot size requirements for septic systems. (Appendix D at 13, 22; see text at n.6 *supra*.).

The Board denied White Wing's applications on July 5, 1995. (Appendix D at 8).[18] The Board's resolution[19] cited the following grounds for denial of White Wing's request for a public sewage treatment facility:

> 1. The role of the unincorporated area of the County is "to accommodate agriculture and a moderate amount of rural residential housing [with] only a minimal level of public services . . . ."
>
> 2. "Rural residential development should be self-sufficient with respect to sewage disposal, and . . . rely on approved individual, on-site septic systems; new development which requires public sewer service should be located within incorporated cities . . . ."
>
> 3. The individual on-site septic system requirement "establishes a physical limitation on the potential development density of rural residential areas," and a "public sewage facility for this site could set a precedent for . . . other rural residential areas, thereby increasing [their] potential development densities . . . ."

(Appendix D at 17-18, Appendix E at 2-3).[20] In the same resolution, the Board reconfirmed the adequacy of the 1993 EIR which had concluded that a public treatment facility on the Property would not set a precedent and would be environmentally superior to the use of individual septic systems. (Appendix D at 19-20, 29, Appendix E at 2).

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[18]Respondent Planning Commission had previously recommended denial of the amendments on June 1, 1995. (Appendix D at 13).

[19]The Board's resolution No. 95-150 is set forth in full as Appendix E to this petition.

[20]The Board denied White Wing's request to amend the LUCE to conform to the one unit per two-acre density designation in the WCGP, on the ground *inter alia* that "individual on-site septic systems require a minimum building site area of 2.5 acres. . . ." (Appendix E at 3).

As explained below, County's resolution fails to articulate any legitimate governmental purpose for mandating an environmentally inferior method of sewage disposal that poses a demonstrated threat to public health. Accordingly, its regulation as applied to the development of White Wing's property violates this Court's established standards under the Fifth and Fourteenth Amendments for the constitutional exercise of the police power, and must be overturned.

B. WHITE WING'S PRESERVATION OF THE FEDERAL CONSTITUTIONAL QUESTIONS IN THE CALIFORNIA COURTS

White Wing's Verified Petition sought a writ of mandate[21] to vacate County's action on the ground that requiring septic sewage disposal on the Property and prohibiting central

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[21] California law requires that a landowner alleging a "regulatory taking" must file a petition for writ of mandate to determine the validity of the challenged regulation, prior to or concurrently with an action for damages based on inverse condemnation. See *Hensler v. City of Glendale*, 8 Cal. 4th 1, 13-14, 876 P.2d 1043, 1051, 32 Cal. Rptr. 2d 244, 252 (1994); *Rossco Holdings, Inc. v. State of California*, 212 Cal. App. 3d 642, 656-661, 260 Cal. Rptr. 736, 743-745 (1989). White Wing followed this required procedure in the present case.

The landowner's mandate petition must be filed within the applicable period of limitations for such a petition. *Hensler*, supra, 8 Cal. 4th at 21-22, 876 p. 2d at 1057, 32 Cal. Rptr. 2d at 258-259. In this case, White Wing challenged County's refusal to amend its general plan to exempt White Wing from compliance with County's requirement of septic disposal systems. The applicable limitations period for such a challenge at the time of County's refusal to amend the plan was 120 days from that refusal. Former California Government Code § 65009(c)(1); see *Hensler, supra*, 8 Cal. 4th at 22, 876 P.2d at 1057, 32 Cal.Rptr. 2d at 258. White Wing filed its petition on August 20, 1995, well within the 120-day period, which commenced on July 5, 1995.

The Court of Appeal held in this case that White Wing's *complaint for declaratory relief* constituted an attack on the "initial enactment" of the general plan that was time-barred under Government Code § 65009(c)(1). (Appendix A at 11). That holding has no application to

treatment facilities "did not substantially advance a legitimate state interest, exceeded the scope of County's authority to regulate under its police power and constituted a taking of property under the Fifth and Fourteenth Amendments of the United States Constitution " (Appendix D at 2). White Wing further alleged that County's actions were "contrary to the health, safety and welfare of the citizens of County and are thus void." (*Id.* at 24; see also *id.* at 14, 18, 22, 24-29).

Respondents' demurrer alleged that the Verified Petition failed to state a cause of action because the Board's decision was an exercise of legislative "discretion" against which the courts were powerless to intervene. (CT 44-45, 49-51).[22] White Wing responded that County had no legislative discretion to maintain general plan provisions that violate White Wing's constitutional rights under the Fifth and Fourteenth Amendments. (*Id.* at 71-76). Following a hearing, the Superior Court dismissed the Verified Petition on the ground that it "asks the Court to perform a legislative function, which the Court may not do due to the constitutional doctrine of separation of powers." (Appendix C at 2).

White Wing maintained its constitutional arguments in its appeal to the California Court of Appeal. (Appellant's Opening Brief to California Court of Appeal at 13-25). The Court of Appeal rejected White Wing's arguments, stating that its mandamus claim was "necessarily subject to the fundamental constitutional doctrine of the separation of powers," and that "mandamus will not lie to compel a legislative body to perform legislative acts in a particular manner, or to remedy legislative inaction." (Appendix A at

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White Wing's petition for writ of mandate to set aside County's July 5, 1995 actions, which is the basis of this petition for certiorari.

[22]County argued that "the adoption [or amendment] of a general plan is a legislative act; *the wisdom or merits of the plan are not proper subjects of judicial scrutiny.*" (CT 51).

6). The court further held that "a land use restriction . . . withstands constitutional attack if it is 'fairly debatable that the restriction in fact bears a reasonable relation to the general welfare.'"[23] (*Id.* at 8).

White Wing's petition for review to the California Supreme Court explicitly tendered the issue whether "action by a local governing body restricting the use of real property by means of a regulation that does not substantially advance a legitimate state interest, constitutes a taking in violation of the rights of the property owner protected by the Fifth and Fourteenth Amendments of the U.S. Constitution. . . ." (Petition for Review to California Supreme Court, at 2). The California Supreme Court denied White Wing's petition without opinion on October 16, 1996. (Appendix B).

ARGUMENT

A. COUNTY'S SEPTIC SYSTEM MANDATE FAILS TO ADVANCE ANY LEGITIMATE STATE INTEREST AND ENDANGERS THE HEALTH, SAFETY AND WELFARE OF ITS CITIZENS.

1. A Land Use Restriction That Does Not Substantially Advance A Legitimate State Interest May Not Stand.

The Court's recent opinions construing the Takings Clause uniformly emphasize that state land-use regulations

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[23]The Court of Appeal cited only a California decision (*Associated Home Builders, etc. v. City of Livermore*, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976), in support of this "fairly debatable" standard of review. (See Appendix A at 8). *Dolan* has discredited this standard. See text at p. 20 *infra*.

must *substantially* advance a legitimate governmental interest in order to pass constitutional scrutiny. *E.g., Dolan v. City of Tigard*, 512 U.S. ____, 114 S.Ct. 2309, 2316 (1994), citing *Agins v. Tiburon*, 447 U.S. 255, 260 (1980); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016, 1023-1024 (1992); *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987); see also *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127, 133 n.29 (1978); *Moore v. City of East Cleveland*, 431 U.S. 494, 513-514 (1977) (Stevens, J., concurring). This principle is of long standing in the Court's jurisprudence. In 1928, the Court struck down one of the first municipal zoning ordinances to come before it under the Fourteenth Amendment, holding that:

> "The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and, *other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.*"

Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928).

Because of its origins in the Takings Clause, the requirement that a land-use regulation must substantially advance a legitimate state interest demands more than a legislative finding of some rational connection between the regulation and the interest purportedly being served. See *Dolan, supra*, 512 U.S. at ____, 114 S.Ct. at 2316 n.5; *Nollan, supra*, 483 U.S. at 834-835 n.3. Only two years ago, in *Dolan*, the Court expressly rejected the term "reasonable relationship" to describe the required connection as being confusingly similar to the less stringent "rational basis" test under the Equal Protection Clause, 512 U.S. at ____, 114 S. Ct. at 2319. As the Court had previously explained in *Lucas*, "the Takings Clause requires courts to do more than insist upon artful

harm-preventing characterizations" by state legislatures. 505 U.S. at 1025-1026 n.12.

This case involves a key element of the takings issue that the Court's previous decisions have not required it to examine: Does a land-use regulation substantially advance a legitimate state interest if it creates a demonstrated threat to public health and safety, and if the goals it purportedly serves are fully effectuated by other regulations already in place?

2. County's Prohibition Of Central Sewage Treatment Facilities In An Area Where Individual Septic Systems Have Created An Ongoing Danger To Public Health Serves No Legitimate Governmental Purpose.

County's policy of mandating individual septic systems and prohibiting central treatment facilities has led to severe pollution of ground and surface water resources, creating a clear threat to public health. Extending the reach of that policy to the 1220 acres of White Wing's property will only worsen these conditions and lessen the prospects for the watershed's eventual recovery. Although County's policy purports to further the goal of restricting residential development and growth in its unincorporated area, County has had other regulatory controls in place for more than twenty years that *directly* limit the density and intensity of permitted development. These controls are backed up by open space, visual, topographic and other planning constraints that further curtail such development. Viewed in light of these facts[24], County's policy reveals itself as an arbitrary and pernicious dictate that serves no legitimate governmental

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[24] We emphasize once more that the facts of this case are as alleged by White Wing in its Verified Petition, and that the sole issue is whether, *assuming those facts to be true*, Petitioner has stated a valid claim for relief under the Fifth and Fourteenth Amendments and ancillary civil rights statutes. See authorities at n. 1 *supra*.

purpose and wreaks harm to the public welfare it nominally protects.

The gravity of that harm is beyond question. Due to septic system failures in the area of White Wing's property, and County's admitted inability to detect or remedy them, State public health levels for pathogenic organisms are being violated in both groundwater and surface drainage. These public health threats persist *despite* County's enforcement of development densities and minimum lot sizes that purportedly ensure the safe functioning of septic systems.

White Wing does not disagree that limitation of residential densities and protection of open space and agricultural resources are valid governmental objectives that County may pursue by *legitimate* regulatory means. White Wing's proposed development complies fully with *all* of County's regulatory standards for density and intensity of development, open space preservation and avoidance of growth inducement in the area of the Property. Its plans are likewise consistent with Proposition A, County's primary regulatory mechanism for preservation of agricultural and open space lands.

But County's prohibition of central wastewater treatment facilities, and its obdurate insistence on individual septic systems, are totally *un*necessary for the achievement of its growth-control objectives. White Wing's proposed treatment facility would serve *only* the Property, and *only* at the permitted level of development. It would be incapable of serving other undeveloped properties, or of supporting development of White Wing's property to a greater density at some later time. In short, County's septic system mandate, as applied to White Wing's property, serves no valid governmental purpose that could conceivably justify the damage it has inflicted, and continues to inflict, on public resources and the public health.

3. County Has Failed To Articulate Any Rational Justification For Its Regulation.

The Board of Supervisors resolution denying White Wing's applications only confirms the lack of a legitimate governmental interest that County's regulation would substantially advance. To recapitulate, the Board's resolution states that: (1) County's unincorporated area is only intended to accommodate "agriculture and a moderate amount of rural residential housing [with] a minimum level of public services;" (2) "rural residential development should be self-sufficient [and] rely on approved individual, on-site septic systems"; and (3) the requirement of individual septic systems "establishes a physical limitation on . . . potential development density", and a public treatment facility could set a precedent that would increase development densities in other areas. (Appendix E at 2-3).

As set forth above, White Wing's proposal only contemplates "a moderate amount of residential housing": the amount permitted under county's own general plan. The proposal also calls for only the "minimal level of public services": a sewage treatment facility that would serve only the development and which, as respondents conceded in their own staff report, is necessary to "overcom[e] the property's physical constraints which make on-site septic systems at minimum parcel size proposed infeasible." (Brief of Amici Curiae to California Court of Appeal, Exhibit A at A-16)).[25]

County's proclamation that "rural residential development should be self-sufficient and . . . rely on approved indi-

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[25] A policy allowing "only the minimal level of public services" might also serve the goal of conserving County's fiscal resources, but the policy would still be inapplicable in this instance because White Wing proposed to construct the treatment facility at its own expense and the facility's operations would be financed by typical user fees.

vidual, on-site septic systems" is a mere tautology: "Septic systems are required because rural residences ought to be self-sufficient and rely on them." Why should they? No doubt the malfunctioning septic systems that are now leaching untreated effluent into the ground and surface waters near White Wing's Property were also "approved" individual systems that were intended to provide "self-sufficient" sewage disposal. In practice, such "self-sufficiency" has amounted to misappropriation of a public resource by scattered pollution sources that County is unable even to identify, much less control.

The corollary to County's "self-sufficiency" policy — that "new development which requires public sewer service should be located within incorporated cities" — is just as empty of substance. County allows rural residential developments to utilize and rely on public roads, public water treatment, public police and fire protection, public libraries and other public services. There is nothing inherently different about a public sewage treatment facility that requires it to be in a city, or makes it a hallmark of an "urban" area, particularly when it is designed to serve only a specific development. Paradoxically, the annexation of White Wing's property to the City of Fairfield, the closest city, would produce the exact result County seeks to avoid: By enabling not only White Wing's property, but all other intervening properties to be connected to the City of Fairfield's municipal treatment facility, it would "urbanize" all of those intervening lands.[26]

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[26]The "alternative" of annexation cannot rescue County's septic system mandate from invalidity. A political body cannot defend an unconstitutional land-use regulation on the ground that property owners are free to seek annexation by another jurisdiction, any more than it could justify an invalid restriction of First Amendment rights by suggesting that its disaffected citizens move to a more tolerant community.

In upholding County's policy, the Court of Appeal adopted the rationale that the policy fulfills the "cornerstone principle" of the general plan to direct "new urban development and growth toward municipal areas." (Appendix A at 8). That begs the question in the same way as the Board's own resolution, because White Wing's project is not an "urban development" under the express terms of the County's general plan. The plan allows a specified level of "low-density planned-unit development" — one unit per two acres — in the "rural residential" area where White Wing's property is located. *That is exactly the level of development White Wing proposed for the Property.*

County's assertion that "the present [septic system] requirement establishes a physical limitation on potential development density. . . ." is a *non-sequitur.* A regulatory imposition is not a "physical limitation." It is County's absolute insistence on individual septic systems and its flat prohibition of central treatment facilities, not the area's physical conditions, that limits development density. The County could just as well cite lack of roads, domestic water or gas and electricity as a "physical limitation" on development — until the necessary infrastructure is provided. Furthermore, the "physical limitation" magically disappears as soon as the lands in question are annexed to an existing city.

County's contention that its approval of a treatment facility for the White Wing property would set a "precedent" for other rural areas is belied by the EIR that the Board certified in 1993 and reconfirmed in its July 5, 1995 resolution denying White Wing's applications. The EIR concluded that no such "precedent" would ensue because there is no other property in the County with a comparable general plan designation that is capable of residential development under Proposition A.

Moreover, the record discloses that a "precedent" for the central treatment facility proposed by White Wing already

exists. In 1984, when County's septic system mandate was in effect, it signed the Rancho Solano development agreement, providing for a central treatment facility in its unincorporated area. County took this earlier action on the basis of an EIR which, like the White Wing EIR, recognized the technological and environmental superiority of such a facility over individual septic systems. Even if "avoiding a precedent" could justify the perpetuation of a regulatory regime that demonstrably endangers public health, White Wing's applications involved no such precedent.

The California Court of Appeal did not consider whether County's regulation *substantially advanced* a legitimate state interest, as this Court's decisions require. It relied instead on California precedent that a land-use restriction "withstands constitutional attack if it is 'fairly debatable' that the restriction in fact bears a reasonable relation to the general welfare." (Appendix A at 8, quoting in part from *Associated Home Builders of the Greater East Bay v. City of Livermore*, 18 Cal. 3d 582, 601, 604, 557 P.2d 473, 483-485, 135 Cal. Rptr. 41, 52, 53 (1976)). As this Court made clear in *Dolan* (512 U.S. at ___; 114 S. Ct. at 2318-2319), the "fairly debatable" and "reasonable relationship" standards are inadequate expressions of the "essential nexus" (*Nollan, supra*, 483 U.S. at 837) between means and ends that the Takings Clause requires. That nexus must be *actual and substantial in nature*, not just "fairly debatable." See *Dolan*, 512 U.S. at ____, 114 S. Ct. at 2320-2322.

Although the Court of Appeal professed that it "[had] not overlooked [White Wing's] allegations concerning the problems with septic sewage disposal facilities and the technological superiority of central wastewater treatment" (Appendix A at 10), it ignored the relevance of those facts to the relationship between County's regulation and the "general welfare" of its citizens. It made no mention of the ongoing violations of state water quality standards caused by

County's mandated use of septic systems, nor did it explain how a land-use regulation that creates a severe public health risk could substantially advance any legitimate state interest.

Neither County nor the California courts has supplied the reasoned justification for respondents' regulation that this Court's precedents demand. The regulation positively harms, rather than substantially benefits, the public health and welfare. As applied to White Wing's property, it works a taking of that property in violation of the Fifth and Fourteenth Amendments.

B. WHITE WING'S CONSTITUTIONAL CHALLENGE TO COUNTY'S REGULATION IS RIPE FOR DECISION.

The California Court of Appeal did not invoke the ripeness doctrine in ruling on White Wing's First Cause of Action for Writ of Mandate. (See Appendix A at 5-11). The court did rely on that doctrine in dismissing White Wing's Fourth Cause of Action for damages based on inverse condemnation, stating that "a claim that an ordinance is an unconstitutional taking as applied to particular property does not present a concrete controversy ripe for judicial review unless the plaintiff has submitted a subdivision plan or applied for a permit or variance which has been conclusively denied." (*Id.* at 12).

The ripeness doctrine has no application to the issue that White Wing brings to this Court. As County has itself acknowledged (see Brief of Amici Curiae to California Court of Appeal, Exhibit A at A-16), its septic system mandate effectively prevents White Wing from developing its property in the manner otherwise permitted by County's general plan. White Wing attempted to avoid that mandate in the only way it could — seeking an amendment or exemption in the manner prescribed by law.

Because County's septic system mandate is part of its general plan, and California law requires all rezonings and subdivision map approvals to be consistent with the plan (see *Lesher v. City of Walnut Creek*, 52 Cal. 3d 531, 536, 802 P.2d 317, 318, 277 Cal. Rptr. 1, 2 (1990); *DeVita v. County of Napa*, 9 Cal. 4th 763, 772, 889 P.2d 1019, 1024, 38 Cal. Rptr. 2d 699, 704 (1995)), a general plan amendment was prerequisite to County's approval of any development on White Wing's Property served by a central treatment facility. Under California law (Government Code § 65358), general plan amendments may be initiated by affected landowners, under procedures adopted by the legislative body — in this case, the Board. White Wing complied with those procedures in seeking a site-specific amendment to the plan exempting its property from County's septic system mandate. The Board's denial of that request was final and unqualified: it determined that "*the General Plan should not be amended to allow public sewage disposal facilities in the rural residential area designated PUD (.5) by the West Central Solano County General Plan*"[27] (Appendix E at 1). White Wing had no legislative or administrative recourse from that denial. Respondents have not alleged that any such legislative or administrative remedy exists, nor have they identified any other procedure that would enable White Wing to develop its property with a central treatment facility. (Appendix A at 26). White Wing's only recourse was to the courts, which denied its petition to set aside the Board's determination.

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[27] As noted above, White Wing's property is the *only* property so designated.

C. EFFECTIVE JUDICIAL RELIEF AGAINST COUNTY'S UNCONSTITUTIONAL REGULATION DOES NOT VIOLATE THE SEPARATION OF POWERS.

The California courts also relied in part on the separation of powers in denying White Wing's claim for relief against County's regulation. (Appendix C at 1; Appendix A at 6). Because the amendment of a general plan is a legislative act under California law (*Yost v. Thomas*, 36 Cal. 3d 561, 570, 685 P.2d 1152, 1158, 205 Cal. Rptr. 801, 807 (1984); Government Code § 65301.5), and White Wing had sought to exempt its property from the regulation by such an amendment, the lower courts professed their inability to "perform a legislative function" (Appendix C at 1), or to order County "to enact particular legislation" (Appendix A at 6), as a basis for denying White Wing all relief.

This Court has recognized for nearly two hundred years that judges do not usurp the powers of legislative bodies by adjudicating the constitutional validity of their actions. "[I]t is emphatically the province and duty of the judicial department to say what the law is." *United States v. Nixon*, 418 U.S. 683, 703, 705 (1974), quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). "Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility." *Powell v. McCormack*, 395 U.S. 486, 549 (1969). These same principles apply to this Court's review of actions by the legislature of a State. *E.g.*, *Baker v. Carr*, 369 U.S. 186, 210-211, 217, 226 (1962).

The California courts have likewise affirmed that "the power of the courts to test legislative and executive acts by the light of constitutional mandate" is "probably the most

fundamental" of the protections afforded by the separation of powers. *Bixby v. Pierno*, 4 Cal. 3d 130, 141, 481 P.2d 242, 249, 93 Cal. Rptr. 234, 241 (1971). Just as this Court has "squarely rejected the argument that the Constitution contemplates a complete division of authority between the three branches" (*Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977)), so have the California courts held that the separation of powers doctrine "does not mean that the actions of one branch may not significantly affect those of another branch." (*Superior Court v. County of Mendocino*, 13 Cal. 4th 45, 52, 913 P.2d 1046, 1051, 51 Cal. Rptr. 2d 837, 842 (1996)), and "is not intended to prohibit one branch from taking action properly within its sphere that has the *incidental* effect of duplicating a function or procedure delegated to another branch." *Younger v. Superior Court*, 21 Cal. 3d 102, 117, 577 P.2d 1014, 1024, 145 Cal. Rptr. 674, 684 (1978) (emphasis in original).

Therefore, both this Court and the California courts have ample authority and ability to prevent County from enforcing its septic system mandate against White Wing in violation of its constitutional rights, even if they "lack the power to order the Legislature to pass a prescribed legislative act." See *Mandel v. Myers*, 29 Cal. 3d 531, 551 n.9, 629 P.2d 935, 947 n.9, 174 Cal. Rptr. 841, 853 n.9 (1981).[28] Under

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[28] White Wing initially prayed for a writ of mandate "directing Board to set aside its decision denying the General Plan amendments proposed by Plaintiff and directing Board to adopt the amendments." (Appendix D at 30). White Wing made clear in the Court of Appeal and the California Supreme Court, however, that what it sought was "a writ directing Respondents to set aside their decision and reconsider the matter in light of the proper public welfare considerations," and that "such an order would not require the Court to 'legislate' because it would not require Respondents to take any particular legislative action." (Appellant's Reply Brief to California Court of Appeal, at 10-11; see also Petition for Review to California Supreme Court at 11-14). As set forth above (n. 1), White Wing's right to a full hearing on the merits of

California law, this result is achieved by issuance of a peremptory writ of mandate that orders respondents to set aside and reconsider their decision, and to proceed thereafter in a manner consistent with the opinion of the court. See, *e.g.*, *Citizens for Quality Growth v. City of Mount Shasta*, 198 Cal. App. 3d 433, 448-449, 243 Cal. Rptr. 727, 736 (1988).

In this case, White Wing sought a peremptory writ of mandate to prohibit the enforcement of County's septic system requirement against its property.[29] Upon determining that White Wing's allegations of unconstitutionality are correct, the California courts could grant White Wing the requested relief by ordering County to cease enforcing that provision of its general plan against White Wing and to act upon White Wing's development applications in a manner consistent with that judicial determination. County would then have at least three options in complying with the writ: (1) it could cease enforcing the septic system requirement against White Wing without making any changes in the text of its general plan; (2) it could adopt the specific general plan amendment proposed by White Wing which by its terms applies only to White Wing's property; or (3) it could substitute its own amendment of the plan in a manner consistent with the opinion of the court.

Such a writ would not compel County's Board of Supervisors to enact any particular legislation, or any legislation at

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its constitutional claim may not be curtailed because its initial prayer for relief was overly broad.

[29]The California courts refer to this recognized function of a writ of mandate as "prohibitory mandate." See *Planned Parenthood Affiliates v. Van de Kamp*, 181 Cal. App. 3d 245, 262-263, 226 Cal. Rptr. 361, 367-368 (1986). In such a case "a court will issue a writ ordering officials to stop enforcing a provision which it finds unconstitutional." *Horwath v. City of East Palo Alto*, 212 Cal. App. 3d 766, 773 n.8, 261 Cal. Rptr. 108, 111-112 n.8 (1989).

all. The writ would fall within the recognized scope of judicial authority and would grant White Wing effective relief against County's unconstitutional application of its regulation to White Wing's property. The "separation of powers" doctrine poses no obstacle to such relief.

CONCLUSION

The Court should grasp this opportunity to hold that a state land-use regulation which endangers public health and welfare fails to serve any legitimate governmental purpose, and thus effects an unconstitutional taking of property in violation of the Fifth and Fourteenth Amendments. In so holding, the Court would strengthen a vital principle of its takings jurisprudence.

Dated: December 27, 1996

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APPENDIX A

FILED
County of Solano
JUL 10 1996
RON D. BARROW, Clerk
By_____
Deputy

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

WHITE WING DEVELOPMENT, INC.,
Plaintiff and Appellant,
vs.
COUNTY OF SOLANO et al.,
Defendants and Respondents.

A072444
(Solano County
Super. Ct. No. L005446)

Plaintiff White Wing Development, Inc., filed a petition for writ of mandate and complaint for declaratory relief and damages against the County of Solano (County) and others, attacking the denial of plaintiff's application for amendments to the County's general plan. The trial court sustained defendants' demurrer without leave to amend and dismissed the petition and complaint. Plaintiff appeals from the judg-

ment of dismissal.[1] We conclude that plaintiff's complaint does not state a cause of action under any legal theory and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Initially, we note that because this appeal arises from the sustaining of a demurrer, we must assume the truth of all properly pleaded material allegations of fact (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 635), but not of allegations contrary to matters of which we must or may take judicial notice. (*Blank v. Kirwan* (1985) 19 Cal.3d 311, 318; *Martinez v. Socoma Companies, Inc.* (1974) 11 Cal.3d 394, 399.) Nor do we assume the truth of contentions, deductions, or conclusions of fact or law, such as allegations that the County's actions were arbitrary and capricious or an abuse of discretion. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125; *Sklar v. Franchise Tax Board* (1986) 185 Cal.App.3d 616, 621.)

Plaintiff owns approximately 1,580 acres in an unincorporated area of the County, in the foothills west of the City of Fairfield; it acquired the property from its predecessor-in-interest sometime before 1993. The West Central Solano County General Plan (the general plan), adopted in 1975, designates the western 1,220 acres of plaintiff's property as very low density residential, with a maximum development density of up to 1 unit per 2 acres. The Land Use and Circulation Element of the Solano County General Plan, adopted initially in 1980, designates that acreage as rural

[1] A brief in support of defendants has been filed by amici curiae, Solano County Orderly Growth Committee, Green Valley Landowners' Association, Greenbelt Alliance, Rockville Homeowners' Association, Suisun Valley Farmers, and City of Vacaville.

residential, with a density ranging from 1 unit per 10 acres to a maximum of 1 unit per 2.5 acres.[2] The general plan requires use of on-site septic sewage systems for household wastewater disposal in unincorporated low density rural residential areas. The 2.5 acre lot size was set because other regulations established that density as the minimum size of lots using septic systems.

In 1984, the County's voters adopted an ordinance by initiative (Proposition A), requiring a public vote before open space land use designations can be changed to allow residential development. As originally passed by the voters, the measure was to expire in 1995, but it has been extended by the County's Board of Supervisors (Board) through 2010. The Proposition A restriction does not apply to the western 1,220 acres of plaintiff's property.

In 1990, plaintiff's predecessor-in-interest applied to the County for various general plan amendments. Eventually, in February 1995, plaintiff revised the application, eliminating certain proposals and seeking amendments permitting use of a central wastewater treatment facility instead of septic sewage disposal and resolving the apparent inconsistency between the general plan and the land use element density limitations by applying that in the general plan, 1 unit per 2 acres.[3]

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[2]Both the general plan and the land use element designate the eastern 360 acres of plaintiff's property as limited to agricultural uses.

[3]Plaintiff's revised application also sought inclusion of a golf course as a permitted use in a rural residential area and designation of the golf course area as open space for purposes of determining residential density. The County's actions in response to these requests are not pertinent to the issues raised in this appeal.

APPENDIX A

The County's Planning Commission rejected the proposed amendments, and plaintiff appealed to the Board. After a public hearing, the Board denied the application. The Board's decision is set forth in Resolution No. 95-150, which explains its reasons as follows:

"1. The principal housing role of the unincorporated County is to accommodate agriculture and a moderate amount of rural residential housing, where only a minimal level of public services are provided; and

"2. Rural residential development should be self-sufficient with respect to sewage disposal, and should rely on approved individual, on-site septic systems; new development which requires public sewer service should be located within incorporated cities; and

"3. The present requirement for individual on-site septic systems establishes a physical limitation on the potential development density of rural residential areas; to allow a public sewage disposal facility for this site could set a precedent for allowing public sewage disposal facilities in other rural residential areas, thereby increasing the potential development densities of those areas beyond their present limits; . . ."

Thereafter, plaintiff filed a petition for writ of mandate and complaint for declaratory relief and damages, naming as defendants the County, the Board, and the planning commission. Plaintiffs complaint alleged, among other matters, that septic tanks are inferior to a wastewater treatment plant as a method of sewage treatment and disposal. Plaintiff alleged that the Board's refusal to adopt the proposed general plan amendments to allow a central wastewater treatment facility was arbitrary, capricious, and irrational. Plaintiff sought (1) a writ of mandate directing the Board to set aside its decision denying the proposed general plan

amendments and to approve the amendments; (2) a judgment voiding all provisions of the general plan mandating septic sewage disposal and disallowing central wastewater treatment facilities; and (3) damages for violation of its civil rights and for inverse condemnation.

Defendants demurred, and the trial court sustained the demurrer without leave to amend, reasoning that plaintiffs petition and complaint requested relief that the court could not grant because of the constitutional doctrine of separation of powers. Judgment was entered dismissing the petition and complaint. This appeal followed.

PETITION FOR WRIT OF MANDATE

According to plaintiff, the County abused its discretion, acted arbitrarily and capriciously, and exceeded the scope of its police power when it refused to amend the general plan to allow use of a central wastewater treatment facility. Plaintiff insists that the County had no choice but to permit use of such a facility, and that mandate lies to order approval of the amendment.

A party's entitlement to a writ of mandamus is governed by well-settled principles. Mandamus is issued "to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, . . ." (Code Civ. Proc., § 1085.) To obtain relief by writ of mandate, the petitioner must show a clear, present, and usually ministerial duty upon the part of the public body or official, and a clear, present, and beneficial right in the petitioner to performance of that duty. (*Loder v. Municipal Court* (1976) 17 Cal.3d 859, 863; *Barnes v. Wong* (1995) 33 Cal.App.4th 390, 394-395.) Although mandamus is available to compel the exercise of discretion in the first instance, it cannot be used to direct the exercise of that discretion in a particular manner

or to reach a particular result. (*Sklar v. Franchise Tax Board, supra*, 185 Cal.App.3d at p. 622.)

When a party seeks mandamus to compel action by a legislative body, the availability of the writ necessarily is subject to the fundamental constitutional doctrine of separation of powers. By virtue of that doctrine, courts generally lack the power to order legislative bodies to enact particular legislation. (*Mandel v. Myers* (1981) 29 Cal.3d 531, 551, fn. 9.) As a result, it is often said that mandamus will not lie to compel a legislative body to perform legislative acts in a particular manner, or to remedy legislative inaction. (See, e.g., *Hutchinson v. City of Sacramento* (1993) 17 Cal.App.4th 791, 796-798; *Sklar v. Franchise Tax Board, supra*, 185 Cal.App.3d at pp. 624-625.)

There is a narrow exception to that general rule, based on the principle that the writ will issue where under the facts, discretion can be exercised in only one way. (See *Robbins v. Superior Court* (1985) 38 Cal.3d 199, 205; *Babb v. Superior Court* (1971) 3 Cal.3d 841, 845.) Illustrative is *Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 344-345, in which the Supreme Court held that mandamus was available to require a city council to adopt a particular salary ordinance, reasoning that the council was bound by a negotiated memorandum of understanding and had no discretion to do otherwise. (See also *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 540.)

In this case, plaintiff seeks an order compelling the County to amend its general plan in a particular manner. A general plan has been described as a constitution for future development, at the top of the hierarchy of local government law regulating land use (*De Vita v. County of Napa* (1995) 9 Cal.4th 763, 773-774), and its adoption is a legislative act.

(*Yost v. Thomas* (1984) 36 Cal.3d 561, 570.) Once a legislative body has adopted a general plan, it has discretion to amend that plan, if it deems amendment to be in the public interest. (Gov. Code, § 65358.)[4] A general plan amendment is also a legislative act. (*Yost, supra*, at p. 570; Gov. Code, § 65301.5.) "The amendment of a general plan . . . is an act of formulating basic land use policy, for which localities have been constitutionally endowed with wide-ranging discretion." (*DeVita, supra*, at pp. 781-782.)

General plans and their amendments are subject to judicial review by mandamus for substantial compliance with state statutes. (Gov. Code, §§ 65301.5, 65750 et seq.; see *DeVita v. County of Napa, supra*, 9 Cal.4th at p. 796, fn. 12; *Garat v. City of Riverside* (1991) 2 Cal.App.4th 259, 292-293 [disapproved on other grounds in *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743, fn. 11]; *Concerned Citizens of Calaveras County v. Board of Supervisors* (1985) 166 Cal.App.3d 90, 96.) The scope of review in such cases is limited to a consideration of whether there has been actual compliance with respect to the substance essential to every reasonable objective of the statutes regulating general plans. Unless arbitrary and capricious or entirely lacking in evidentiary support, the plan or its amendment must be upheld. (*Garat, supra*, at p. 292.) The adoption of elements of a plan not in compliance with those statutes is arbitrary and capricious, and the trial court may issue a writ of mandate directing the local agency to set aside those elements and adopt legally adequate elements. (*Concerned Citizens of Calaveras County, supra*, at pp. 97, 103, 105.) In other words, a local agency has no discretion to adopt a

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[4] In *DeVita v. County of Napa, supra*, 9 Cal.4th 763, the Supreme Court held that the voters also may amend the land-use elements of a general plan by initiative. (*Id.* at pp. 788, 793, fn. 11, 795-796.)

general plan not in compliance with the statutes regulating general plans, and mandamus will lie to remedy the agency's abuse of discretion.

But judicial review by mandamus does not encompass scrutiny of the wisdom or merits of a general plan or its amendment (*Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 118; *Concerned Citizens of Calaveras County v. Board of Supervisors, supra*, 166 Cal.App.3d at p. 95.) When a land use restriction is challenged solely on the ground that it assertedly exceeds a municipality's authority under the police power, the restriction withstands constitutional attack if it is "fairly debatable that the restriction in fact bears a reasonable relation to the general welfare." (*Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 601, 604.) A court may differ with a zoning authority as to the necessity or propriety of a particular enactment, but as long as it is a question upon which reasonable minds might differ, there will be no judicial interference with the municipality's determination of policy. "In short, . . . 'If the validity . . . be fairly debatable, the legislative judgment must be allowed to control.' [Citation.]" (*Id.* at p. 605.)

The legislative judgment attacked by plaintiff in this case is a decision not to amend a general plan. *Tandy v. City of Oakland* (1962) 208 Cal.App.2d 609, demonstrates the limits of the writ in a similar context. Plaintiffs in *Tandy* sought a writ of mandate directing defendant city to rezone their property. The city's demurrer was sustained without leave to amend, and the appellate court affirmed the judgment of dismissal. Emphasizing that the complaint asked the trial court to compel performance of a legislative act involving the exercise of discretion, the appellate court declared, "It is elementary that the courts have no such

power." "The propriety of rezoning was a matter of legislative determination, not to be interfered with by courts except for clear abuse of discretion or excess of power. "[W]here, as here, there is room for difference of opinion on the subject, the courts will not interfere with the legislative determination. [Citations.]" (*Id.* at pp. 611-612.)

Here, too, plaintiff improperly sought to compel performance of a legislative act involving a policy determination and the exercise of discretion. That conclusion is reinforced by *DeVita v. County of Napa, supra*, 9 Cal.4th 763, in which the question was whether the land-use element of a general plan may be amended by initiative. At issue was an initiative making the redesignation of existing agricultural land and open space conditional on voter approval, with certain exceptions, until the year 2021. Rejecting an argument that the initiative eliminated the ability of local governing bodies to accommodate new development, the Supreme Court explained that the measure sought to protect agricultural land from the encroachment of suburban development by channeling new development and growth toward already developed areas rather than permitting a "leapfrog" pattern of development. (*Id.* at p. 791.) The court could not say whether the initiative's approach to managing growth was the best policy for the County or the state, but it also could not say that the measure thwarted the fundamental objectives of planning law. Instead, the measure was "a reasonable attempt to . . . guide the county's development, curb haphazard growth, and promote desired land uses." (*Id.* at p. 792.)

The Solano County General Plan also seeks to channel new development and growth toward already developed areas. A "cornerstone principle" of the plan is the direction of new urban development and growth toward municipal

areas.[5] To foster that policy, the general plan confines new development requiring public sewer service to areas located in incorporated cities. Rural development in unincorporated areas must rely on individual on-site sewage treatment systems, and that development is limited to the carrying capacity of the land. While we cannot say whether this policy is the best for the County, nor can we say it is irrational or arbitrary or an abuse of discretion.

We have not overlooked plaintiff's allegations concerning the problems with septic sewage disposal facilities and the technological superiority of central wastewater treatment plants. Even though we must assume the truth of properly pleaded allegations of fact, plaintiff's allegations do not lead to the conclusion that the County's only option was to amend its general plan to eliminate the requirement for septic systems on plaintiff's property and allow a sewer system.

Nor have we overlooked plaintiff's allegation, based on *Arnel Development Co. v. City of Costa Mesa* (1981) 126 Cal.App.3d 330, that the County arbitrarily changed its position on the sewage disposal issue after previously certifying an environmental impact report indicating that allowing a central wastewater treatment facility on the property would not create a precedent. First, certification of an environmental impact report is not the equivalent of adopting its conclusions. (Cal. Code of Regs., tit. 14, Section 15090 [lead agency must certify that report has been completed in compliance with California Environmental

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[5] As is appropriate in reviewing a ruling on a demurrer, we have taken judicial notice of the Solano County General Plan, as amended in 1994 consistent with the Orderly Growth Initiative, and of the staff report to the Solano County Planning Commission on plaintiff's application for general plan amendments.

Quality Act, presented to the decisionmaking body of the lead agency, and reviewed and considered by that body before approval of a project]; see Pub. Res. Code, Section 21082.2, subd. (e) [statements in environmental impact report not determinative of whether project may have significant effect on environment].)

Furthermore, *Arnel Development Co v. City of Costa Mesa, supra*, 126 Cal.App.3d 330, is inapposite. In that case, several months after the city approved a specific plan for development of certain property and rezoned the property consistent with the plan, the voters rezoned the property by initiative to preclude the development. (*Id.* at pp. 333-335.) The court invalidated the rezoning ordinance, reasoning in part that it was arbitrary and discriminatory because it was accomplished without evidence of any significant change in circumstances and for the sole purpose of defeating the development (*Id.* at pp. 336-337.) Nothing similar occurred in this case; instead, the County's policies concerning septic sewage disposal have been consistent since before plaintiff acquired its property.

DECLARATORY RELIEF

The request for declaratory relief in plaintiff's complaint belies its insistence that this case does not concern the initial enactment of the general plan or any of its elements. Plaintiff specifically sought a declaration that all provisions of the County's general plan mandating the use of septic sewage disposal and disallowing we of central wastewater treatment facilities are contrary to public health, safety, and welfare, do not substantially advance legitimate state interests, are invalid as purported exercises of the police power, and are therefore void. This attack on the general plan and its elements is clearly timebarred. (Gov. Code, Sec-

tion 65009, subd. (c)(1); *A Local & Regional Monitor v. City of Los Angeles* (1993) 12 Cal.App.4th 1773, 1816; *Garat v. City of Riverside, supra*, 2 Cal.App.4th at pp. 287-289.)

INVERSE CONDEMNATION

The United States Supreme Court has stated, "The application of a general zoning law to a particular property effects a taking if the ordinance does not substantially advance legitimate state interests [citation], or denies an owner economically viable use of his land, [citation]." (*Agins v. Tiburon* (1980) 447 U.S. 255, 260.) A claim that an ordinance is an unconstitutional taking as applied to particular property does not present a concrete controversy ripe for judicial review unless the plaintiff has submitted a subdivision plan or applied for a permit or variance which has been conclusively denied. (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 9-13; *San Mateo County Coastal Landowners' Assn. v. County of San Mateo* (1995) 38 Cal.App.4th 523, 546 and cases cited.)[6] Apparently recognizing that it cannot satisfy this ripeness requirement, plaintiff contends its complaint was sufficient to state a cause of action in inverse condemnation because the case "concerns a regulation that is invalid from the outset under the first prong of the takings test." Although plaintiff's argument on this point is not entirely clear, we understand it to be a facial challenge to the constitutionality of the statute.[7]

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[6] Plaintiff's substantive due process claim fails, as it is also subject to the same ripeness requirement (*San Mateo County Coastal Landowners' Assn. v. County of San Mateo, supra*, 38 Cal.App.4th at p. 546, fn. 15.)

[7] In *Erlich v. City of Culver City* (1996) 12 Cal.4th 854, our Supreme Court recently explained the standard of scrutiny that controls when a

APPENDIX A

" '[W]here the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole.' [Citation]" (*Hensler v. City of Glendale, supra*, 8 Cal.4th at p. 10.) Recently, Division Two of this court discussed a facial challenge to the constitutionality of an ordinance in the context of a takings claim. The court explained that a claim of facial invalidity is only tenable if the terms of the regulation or ordinance will not permit those who administer it to avoid an unconstitutional application to the complaining parties. Furthermore, the question whether an alleged unconstitutional application may be avoided is not governed by the conclusional allegations of the complaint; instead, it turns on the court's appraisal of the legal effect of the regulation. (*San Mateo County Coastal Landowners' Assn. v. County of San Mateo, supra*, 38 Cal.App.4th 523, 547; accord *Tahoe-Sierra Preservation Council v. State Water Resources Control Bd.* (1989) 210 Cal.App.3d 1421, 1441-1442.)

Under the terms of the general plan and its land use element, plaintiff is not foreclosed from development of its property, and its inverse condemnation claim is meritless.

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local government conditions permit approval on monetary exactions or the surrender of benefits that purportedly offset the impact of the proposed development (*Id.* at pp. 867-869, 874-881 [plur. opn. of Arabian, J.]; pp. 905-906 [conc. and dis. opn. of Kennard, J.]; p. 912 [conc. and dis. opn. of Werdegar, J.].) Although amici discuss this case at some length, plaintiff does not contend that the *Erlich* standard applies.

APPENDIX A

DISPOSITION

The judgment is affirmed.

Strankman, P.J.

We concur:

Stein, J.

Swager, J.

White Wing Development, Inc. v. County of Solano
A072444

APPENDIX B

SUPREME COURT
FILED
OCT 16 1996
Robert Wandruff Clerk
By_____
Deputy

First Appellate District,
Division One, No. A072444
S055547

IN THE SUPREME COURT OF CALIFORNIA

WHITE WING DEVELOPMENT INCORPORATED,
Appellant
vs.
County of Solano, et al.,
Respondents

Petition for Review DENIED.

GEORGE
Chief Justice

APPENDIX C

ENDORSED FILED
CHARLES D. RAMEY
By S. Petty

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SOLANO
WHITE WING DEVELOPMENT, INC.,
Petitioner and Plaintiff,
vs.
COUNTY OF SOLANO, BOARD OF SUPERVISORS OF THE COUNTY OF SOLANO, PLANNING COMMISSION OF THE COUNTY OF SOLANO, and DOES 1 through 50,
Respondents and Defendants.

ORDER SUSTAINING DEMURRER WITHOUT LEAVE TO AMEND, AND JUDGMENT DISMISSING PETITION AND COMPLAINT
No. L005446

October 30, 1995

DENNIS BUNTING,
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Attorneys for Respondents/Defendants
County of Solano,
Solano County Board of Supervisors, and
Solano County Planning Commission

The above-captioned matter came on regularly for hearing on October 30, 1995, in Department 1 of this Court, Judge Harris presiding. Howard Ellman of Ellman, Burke,

APPENDIX C

Hoffman & Johnson appeared for Petitioner and Plaintiff; James Laughlin of Solano County Counsel's Office appeared for the named Respondents and Defendants.

After considering the written submittals of the parties and the arguments presented by counsel at the hearing on Respondents' demurrer, the Court finds that the petition and complaint asks the Court to perform a legislative function, which the Court may not do due to the constitutional doctrine of separation of powers.

Based on the foregoing, the Court orders that:

1. Respondents' demurrer to the petition and complaint is sustained, without leave to amend;

2. The petition and complaint are dismissed with prejudice; and

3. Judgment is entered for Respondents.

Dated: September 9, 1995

RICHARD M. HARRIS
Judge of the Superior Court

Approved as to form:

Howard N. Ellman
Ellman, Burke, Hoffman & Johnson
Attorneys for Petitioner/Plaintiff

APPENDIX D

No. L005446

IN THE SUPERIOR COURT
OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SOLANO
WHITE WING DEVELOPMENT, INC. a
California corporation, dba
WHITE WING ASSOCIATES,
Plaintiff and
Petitioner,
vs.
COUNTY OF SOLANO, BOARD OF SUPERVISORS
OF THE COUNTY OF SOLANO, PLANNING
COMMISSION OF THE COUNTY OF SOLANO
AND DOES 1 through 50,
Defendants and
Respondents.

VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY RELIEF, DAMAGES FOR VIOLATION OF CIVIL RIGHTS (42 U.S.C. Section 1983); AND DAMAGES FOR INVERSE CONDEMNATION

Date: 10-30-95
Time: 8:30 am
Dept: 1

HOWARD N. ELLMAN (Bar No. 29820)
KENNETH N. BURNS (Bar No. 65354)
ELLMAN, BURKE, HOFFMAN & JOHNSON,
a Professional Corporation
One Ecker Building, Suite 200
San Francisco, California 94105
Telephone: (415) 777-2727
Attorneys for Plaintiff and Petitioner
WHITE WING DEVELOPMENT, INC.

APPENDIX D

Plaintiff and Petitioner White Wing Development, Inc., a California corporation ("Plaintiff") alleges:

STATEMENT OF THE CASE

1. This action seeks a writ of mandate, declaratory relief and damages for violation of State law, federal statute and of the Constitutions of the State of California and of the United States. Plaintiff seeks relief from actions of the County of Solano, in the purported exercise of power to regulate land use under the California Planning and Zoning Law (Gov't Code §§ 65000 et seq.), that were arbitrary, capricious and lacking in rational basis. As County's actions did not substantially advance a legitimate state interest, they exceeded the scope of County's authority to regulate under its police power and constituted a taking of property under the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Sections 7(a) and 19 of the Constitution of the State of California.

THE PARTIES, JURISDICTION AND VENUE

2. Plaintiff is a California corporation qualified to do business and doing business in the County of Solano, State of California. Plaintiff has complied with the provisions of Business and Professions Code Section 17900 and following, establishing its right to do business under the name White Wing Associates, the name of its predecessor joint venture.

3. Respondent and Defendant, the County of Solano ("County") is, and at all time relevant hereto was, a political subdivision duly organized and existing under the laws of the State of California.

4. Respondent and Defendant, the Board of Supervisors of County ("Board") is, and at all times relevant hereto

was, the legislative and final administrative body of County vested with powers specified under law. The Board is sued herein in its collective and official capacity and not in the individual capacity of the members.

5. Respondent and Defendant, the Planning Commission of County ("Commission") is, and at all times mentioned herein was, an administrative body of County vested with certain powers pursuant to the laws of the State of California and of County. The Commission is sued herein in its collective and official capacity and not in the individual capacity of the members. Collectively, the County, the Board and Commission are referred to herein as the "County Defendants."

6. County Defendants are obligated to perform certain duties and comply with the laws and constitutions of the State of California and the United States of America in the enactment and administration of general plans, zoning ordinances and land use regulations, in the review and processing of applications for development of property in County and for compliance with the constitutionally protected rights of parties to such proceedings.

7. Plaintiff is unaware of the true names and/or capacities of Respondents and Defendants Does 1 through 50, inclusive, and sues said Respondents and Defendants by such fictitious names and will ask leave of this Court to amend this petition and complaint to show the true names and/or capacities when such have been ascertained. Plaintiff is informed and believes and thereon alleges that each of the Doe Respondents and Defendants is in some manner responsible for the acts herein alleged and that (except as otherwise expressly alleged) at all times herein mentioned, Respondents and Defendants and each of them were acting as the agents, servants and/or employees of the other

Respondents and Defendants, within the course and scope of their agency and employment, and with full knowledge and consent, either expressed or implied of each of the other Respondents and Defendants.

8. The acts and omissions herein alleged occurred and took place within County, and Respondents and Defendants and each of them have their principal place of business and conduct their business within County.

FACTS COMMON TO EACH CAUSE OF ACTION AND TO THE PETITION

9. On or about July 30, 1989, White Wing Associates, a joint venture ("Associates") acquired certain real property in the County of Solano (the "Property") more particularly described on Exhibit A, attached hereto and incorporated herein by reference thereto. The principal in Plaintiff was an affiliate of Associates at that time. Prior to 1993, Plaintiff acquired all of the joint venture interests in Associates, continuing to do business under Associates' name.

10. At the time of its acquisition of all interests in Associates, and at all times since, Plaintiff has intended to develop the Property for low-density residential uses with related recreational facilities in a manner generally consistent with the development plans of Associates for the Property. Plaintiff's proposed development has been named "White Wing" and is so known generally within County. The proposed development is referred to as the "Project" herein.

11. Plaintiff's belief that it would be allowed to develop the Project was reasonable based upon County's actions.

These included:

(a) Adjoining and neighboring lands known as Green Valley and Green Valley Highlands have been developed (and approved by County for development) at roughly equivalent densities and to less stringent development standards than those to which Plaintiff has been willing to accept with respect to the Project;

(b) As more particularly alleged in paragraph 16 below, an initiative adopted by the voters that restricts development in County outside city boundaries exempted the Property, showing intent that the most stringent growth control and anti-development policies were not to be applied to it;

(c) In the early 1980s, County approved a tentative subdivision map for a project known as Stone Ridge, with less open space than the Project and with large lots spread generally throughout the project area; and the Property has been designated Planned Unit Development .5 (PUD.5), a development designation adopted in 1975 that has not been changed in nearly twenty years despite several comprehensive revisions of County's General Plan.

12. The Property contains approximately 1,580 acres located in the foothills west of the City of Fairfield in unincorporated Solano County. The Property is bounded by Rockville Road and low-density residential development to the south, Green Valley Country Club and surrounding development (Green Valley and Green Valley Highlands) to the west and agricultural lands to the north and east. A locational map that depicts the Property and surrounding area is attached hereto as Exhibit B and incorporated herein by reference thereto. Elevations on the Property range from 125 feet near Rockville Road to over 750 feet in the

northern part of the site. Topographically, the Property contains steep hills with intervening wide valleys, plateaus and dramatic rock outcroppings. The main access to the site at Rockville Road is a broad, gently sloping savannah.

13. The Property is currently used as rangeland, running a maximum of 200 head of cattle. It contains five livestock ponds and no structures. The Green Valley and Green Valley Highlands residential community to the west and south of the project consist predominantly of single-family houses on large lots dispersed throughout the northerly valley floor and the foothills on either side. Productive croplands on the valley floor are located southerly of the development on the floor of Green Valley. These residences are developed to a density equal to or greater than the density proposed for the Project, with lots ranging from one-third acre to several acres in size. With one notable exception, the residences of Green Valley and Green Valley Highlands use septic sewage systems to dispose of their wastewater, even in areas of higher densities than those proposed for the Project where Plaintiff was denied the right to use a central wastewater treatment facility as hereinafter alleged. A project that consists of 39 units was developed in Green Valley using a central wastewater treatment facility under an approval granted in 1974.

14. The West Central Solano County General Plan, adopted in 1975 ("WCGP"), designates the eastern 360 acres of the Property as "Extensive Agriculture" and the western portion as Very Low-Density Rural Residential/Planned Unit Development at a density of .5 dwelling units per acre (1 unit per 2 acres). The Land Use and Circulation Element of the Solano County General Plan, initially adopted in 1980 ("LUCE"), also designates the eastern 360 acres of the Property "Extensive Agriculture."

APPENDIX D

The LUCE designates the western 1,220 acres of the Property "Rural Residential" (2.5 to 10 acres per unit). Although the LUCE and the WCGP are generally consistent in their policies, statements of purpose and objectives, the density limits conflict and have been in conflict since the LUCE was first adopted in 1980, despite periodic amendments of the LUCE in the intervening years and continued viability of the WCGP. The density conflict has persisted despite County's legal obligation to maintain a complete, internally consistent General Plan; and contrary to its obligation under Government Code Section 65860(c) to bring its zoning ordinances into conformity with the General Plan, the Property is zoned A-20 (agriculture, 1 dwelling unit per 20 acres), a designation that is not consistent with either the LUCE or the WCGP.

15. The LUCE density of one unit per 2.5 acres has its origin strictly and solely as a regulation adopted to accomodate septic sewage disposal systems. The 2.5 acre lot size limit was first adopted as part of the County Septic Tank Regulations (Chapter 25 of the Solano County Code) in 1976 to establish the minimum size of lots using septic systems and served by a public water supply. Chapter 25 was deleted from the Code in November of 1994, when the minimum lot size standards for dwelling sites to be served by septic sewage disposal systems were shifted to Chapter 26 of the County Code dealing with Subdivisions and Other Divisions Of Land. From a General Plan perspective, and as demonstrated by its history and implementation provisions of the Solano County Code, the 2.5 acre minimum dwelling unit size retained in the LUCE has no other purpose or rationale than to accomodate septic sewage disposal systems.

APPENDIX D

16. In 1984, the voters of Solano County adopted Ordinance No. 1230, commonly known as "Proposition A," that requires a public vote before open space land use designations within the County can be changed to allow development. Proposition A was adopted for the express purpose of preserving agriculture and preventing extension of urban services into undeveloped areas outside municipal boundaries. It was promoted in the election campaign by environmental groups as a "no-growth" or "slow-growth," anti-development measure, in direct response to development pressure. Originally adopted with an expiration period in 1995, Proposition A has been extended by the Board through 2010, at which time it will be subject to further extension.

17. The 360 acre easterly portion of the Property designated Extensive Agriculture is subject to Proposition A. The balance of the Property was exempted — and designated for Rural Residential development — at the time Proposition A was adopted. It is the only large, undeveloped parcel designated for rural residential development within County that is so exempted. For that reason, it has a unique status under County's General Plan and land use regulations. The exemption carries out a legislative intent — a vote of the people — that development of the the Property should be allowed.

18. On July 5, 1995, the Board adopted its Resolution denying Plaintiff's requests for General Plan Amendments necessary for development of the Property. The denial brought to a conclusion a process that spanned several years, in accordance with the following chronology:

(a) *April 20, 1990:* Associates files formal applications for General Plan Amendments and rezoning to

RR-PP (Rural Residential-Policy Plan Overlay) District;

(b) *May 11, 1990:* County Staff distributes Notice of Preparation of an environmental impact report with respect to Associate's application;

(c) *May 15 — June 15, 1990:* County Staff solicits proposals from EIR consultants to prepare environmental documentation for the proposed General Plan Amendments. Associates excluded from selection process;

(d) *September 4, 1990:* Contract with environmental consultant executed after approval by Board;

(e) *March 27, 1991:* Environmental consultant submits "administrative draft" EIR (draft prepared for Staff comment) to County Staff for review before circulation for public comment;

(f) *June 14, 1991:* Draft Environmental Report ("DEIR") delivered to State Clearinghouse and circulated for 45-day public comment period;

(g) *July 25, 1991:* Commission holds public hearing on DEIR. After close of hearing, Commission continues consideration to later date;

(h) *August 8, 1991:* After further delibertion, Commission requests changes in the DEIR while directing Staff to begin preparation of "responses to comments" (the document required to convert a DEIR to a final EIR);

(i) *August 27, 1991.* County Staff determines that the scope of the public and Commission comments has exposed defects in the EIR too material and extensive to be addressed in responses to comments, thus requir-

ing complete redraft of the DEIR for recirculation and another round of public comments. In effect, the County Staff finds the document so fatally defective that it must be redrafted, even though the work was prepared under Staff supervision. The original EIR consultant did not perform on time, within budget or in accordance with its contract. Associates was required to pay for the work and County Staff time, despite these failures and County Staff's failure to monitor or enforce the contract;

(j) *January 10, 1992:* County Staff terminates contract with EIR consultant for failure of performance;

(k) *February, 1992:* County enters into contract with a new environmental consultant to redraft a DEIR for recirculation and further public comment. Once again, the applicant is required to bear the full cost of the work, including the cost of County Staff time;

(l) *November 23, 1992:* Revised DEIR completed and circulated for new round of public comment;

(m) *December 17, 1992:* Commission holds public hearing on reissued DEIR. In light of the opposition to the project and the scope of comments, Commission requires that public review period be extended to a full ninety (90) days (February 22, 1993);

(n) *September 27, 1993:* Environmental consultant completes and submits proposed responses to comments;

(o) *October 21, 1993:* Commission holds public hearing on response to comments even though no such hearing is required by law. Following public comment, Commission continues hearing to November 4, 1993;

(p) *November 4, 1993.* Commission adopts a resolution recommending certification of the EIR as an adequate environmental document for purposes of considering the pending General Plan Amendments and rezoning of the Property to RR-PP. The EIR recommended for certification concluded that the proposed General Plan amendments would not (i) result in unmitigated adverse environmental impacts, (ii) establish precedent, or (iii) induce growth;

(q) *December 14, 1993:* After public hearing, Board concludes that FEIR may be certified, but only as an adequate environmental document for consideration of proposed General Plan Amendments. Board concludes that additional environmental documentation may be required for specific project approvals;

(r) *December 15, 1993 — January 9, 1995:* Having learned in December of 1993 that County Staff intended to recommend denial of its proposed General Plan Amendments, and taking into account public and official comments during the hearing process, Plaintiff requested that further processing of its proposed General Plan Amendments be suspended so that it could consider changes that might make its application more acceptable;

(s) *February 20, 1995:* Plaintiff submits revised General Plan Amendments for consideration by the Commission, eliminating several of the amendments previously proposed. The amendments consist of:

(1) A request that a central wastewater treatment facility be allowed (requiring amendment to various portions of County's General Plan that mandate use of septic sewage disposal outside the boundaries of municipalities and that characterize central waste-

water treatment facilities as "urban" and "municipal");

(2) Resolution of the density inconsistency between the WCGP and the LUCE of the 1980 General Plan to allow for the density on the Property stated in the WCGP of one unit per two acres;

(3) Allowing a golf course as a permitted use in a Rural Residential area with PD overlay; and

(4) Allowing the area included within the golf course to be treated as "open space" and thus considered as part of the total base from which residential density may be determined.

Plaintiff's revised application for General Plan Amendment included other implementing provisions consistent with the foregoing.

(t) *May 1, 1995:* County Staff submits its report recommending denial of Plaintiff's proposed General Plan Amendments to the extent that they would (i) allow a central wastewater treatment facility, (ii) allow computation of the golf course area as open space for purposes of determining residential density, and (iii) adopt the density stated in the WCGP as the prevailing density for the Project.

(u) *May 4, 1995:* The Planning Commission holds a public hearing with respect to Plaintiff's revised General Plan Amendment proposals. The hearing is continued to June 1, 1995.

(v) *June 1, 1995.* At the conclusion of the continued public hearing, the Planning Commission adopts its Resolution 4088 denying Plaintiff's request for General Plan Amendments that would (i) would allow a central

wastewater treatment facility in lieu of septic sewage disposal, (ii) include the area of the golf course as open space in the density determination (the denominator of the fraction by which overall Project density is to be limited), and (iii) use the WCGP as the basis for determining density.

The Commission:

(1) Rejected the proposed amendments that would allow use of a central wastewater treatment plant based on findings that (aa) adoption of the requested amendments would set a precedent; (bb) central wastewater treatment facilities are inherently municipal and should be confined to urban areas; (cc) and the feasibility of septic sewage treatment — the capacity of subsoils to accept percolation, represents an effective and appropriate density control. These findings conflict with the conclusions of the certified FEIR that the Commission itself had recommended for certification.

(2) Rejected the proposed amendments that would allow use of the golf course area as "open space" for purposes of calculating density because " . . . the primary role of such private open space is to provide an active recreational use to the outside community rather that a passive visual use to the housing area involved . . ." (Resolution 4088, p.2).

(3) Rejected the proposed amendment that would have applied the density stated in the WCGP to control on the grounds that the later adopted LUCE effectively amended the earlier Plan document, albeit without so stating;

(w) *June 5, 1995:* Plaintiff appealed the Commission's decision to the Board;

(x) *July 5, 1995:* Board conducts a public hearing, at the conclusion of which it affirms the decision of the Commission (i) mandating the use of septic sewage disposal and denying the right to use a central wastewater treatment facility, and (ii) requiring that density for the Property be determined by reference to the LUCE rather than the WCGP. The Board further determined that no golf course should be allowed on the Property at all, thus mooting the question of whether golf course area should be included in gross acreage computation for purposes of determining density.

19. A local governing body such as County has a constitutional and statutory duty to exercise its police power solely for purposes that serve the public health, safety and welfare. Purported exercises of the police power that do not serve such ends do not substantially advance legitimate state interests, are void and constitute takings of the affected property without just compensation. In addition, a local governing body such as County has a duty to adopt, administer and apply its police power regulations in a manner that is consistent with fair procedures and respects the constitutionally protected rights of property owners. In performing all of its functions, it must act rationally — its actions must not be arbitrary, capricious or lacking in rational basis. In its actions with respect to the Property, and as more particularly alleged below, County, Board and Commission have violated all of the foregoing requirements. They have maintained and enforced general plan policies that conflict with public health, safety and welfare. They have purported to justify their action by reference to false and illogical argu-

ments. In doing so, they have acted arbitrarily and capriciously, and without a rational basis for their conclusions.

20. County's refusal to adopt Plaintiff's proposed General Plan Amendments that would have allowed a central wastewater treatment facility—a decision that expressly mandates the use of septic sewage disposal—was arbitrary and capricious and lacking in rational support. In rejecting the proposed amendments that would have allowed a central wastewater treatment facility and mandating the use of septic sewage disposal, the Board and Commission acted contrary to the public health, welfare and safety and abused their discretion. In so deciding, they perpetuated General Plan policies that (i) lie outside the scope of County's police power, (ii) do not substantially advance a legitimate state interest and thus should be declared void on the following grounds, among others:

(a) *Septic Tanks Are An Inferior Method Of Sewage Treatment And Disposal And Should Not Be Used In Any Case Where Their Use Can Be Avoided*

(1) The current literature of the field of wastewater treatment and disposal establish that septic sewage treatment is an inferior and wasteful method of wastewater disposal. It produces a high level of environmental and public health risk and precludes reclamation and reuse of wastewater. It is a method with a high incidence of periodic failure unless closely monitored and maintained. On information and belief, Plaintiff alleges that many Counties in California, including Napa County, have policies that allow use of septic sewage disposal only in those instances where no other method is feasible or available, in recognition of the serious inferiority of the method.

(2) In this instance, unacceptably high levels of fecal coliform contamination—levels that exceed safe public health maximums established by the State of California—already exist in surface drainage and groundwater in the vicinity of the Property. These levels are directly caused by and attributable to the inadequacies of septic sewage disposal in Green Valley and Green Valley Highlands. The Board and Commission knew of these conditions and violations when they acted as alleged in paragraph 18 above.

(3) By Ordinance 1501, adopted in December of 1994 (an update of County's Septic Sewage Ordinance), County deliberately deleted all provision for septic tank and drainfield monitoring. Ordinance 1501 codified an existing condition, a condition that has prevailed for roughly a decade. The condition is this: Despite mandating the use of septic sewage disposal in large areas of the County, County has had no program—and no capability—to monitor the functioning of septic sewage treatment and disposal despite the fact that County's health officers acknowledge the condition and conclusion described in subparagraph 20(a)(1).

(4) Septic sewage disposal facilities do not function effectively unless they are maintained. Proper maintenance requires periodic pumping and removal of sludge from the tank. This highly toxic material must then be disposed of in a landfill qualified to receive it. Such landfill space is in short supply within County. It is a fact commonly known— and well known to officials of County, Members of the Board and Commission—that most homeowners neglect to perform the necessary maintenance in order to save cost, thus adding to the risk of septic system failure. But if they did perform as

required, the large numbers of septic tanks in County would depend upon centralized disposal facilities, such as those operated by the City of Vacaville and the Vallejo Sanitation and Flood Control District.

(b) *A Wastewater Treatment Plant Is A Superior Method of Sanitary Sewage Disposal.*

(1) The technological superiority of a central wastewater treatment plant cannot be denied. It provides for a more effective treatment procedure and a method for reclaiming and recycling wastewater. Wastewater from septic sewage disposal systems cannot be reclaimed.

(2) A central wastewater treatment plant must be designed to meet rigorous standards and cannot begin operation without permits from state and regional pollution control authorities.

(3) In stark contrast to the septic sewage systems in County, a wastewater treatment plant is subject to continuous monitoring by regional and state authorities.

21. Notwithstanding the facts alleged in paragraph 20 that were well known to the Members of the Commission and Board and made part of the record in Plaintiff's application, the Commission and Board rejected Plaintiff's proposed General Plan amendments that would have allowed a central wastewater treatment facility, thus perpetuating and reenforcing its policy requiring the use of septic sewage disposal systems, relying on the following purported grounds:

(a) *Precedent.* Approval of a central wastewater treatment facility would create a precedent for other proposed developments in "rural" areas, thus leading to pressure for higher density;

(b) *De Facto Density Limitation.* The ability of underlying soils to accept percolation and thus demonstrate suitability for septic sewage disposal has served as a convenient density limitation that has become traditional in County; and

(c) *A Wastewater Treatment Plant Is Inherently Urban.* Central wastewater and treatment and disposal facilities are inherently "urban." The Property is located in a "rural" area, despite its proximity to the development in Green Valley and Green Valley Highlands. Introduction of a central wastewater treatment disposal facility would increase the interdependence of the lots within the project and thus inject an "urban" characteristic.

22. All of the purported justifications for the decision by the Commission and Board to reject Plaintiff's proposed General Plan amendments that would have allowed use of a central wastewater treatment facility, and that instead mandate the use of septic sewage disposal, are arbitrary, capricious and lack rational support. The purported justifications expose the decision as (i) failing to a advance legitimate state interest, (ii) illogical, (iii) pernicious, and (iv) contrary to public health, safety and welfare, for the following reasons, among others:

(a) *To Allow A Central Wastewater Facility Would Not Set A Precedent. If Precedent Is An Issue, County Set It With A Previous Approval Of Another Project.*

(1) The Property is the only unincorporated Property within County that was excluded from Proposition A's constraints on development. It is the only property within the County designated PUD.5 under County's General Plan. Thus, nothing that happens on the Prop-

erty establishes a precedent because the Property already has a unique status. It has enjoyed a unique status under County's General Plan, (including Proposition A adopted by vote of the electorate), for more than a decade. Since adoption of the LUCE, County has not amended General Plan policies that apply to the Project or the Property in any significant particular that changes or affects this status.

(2) The certified FEIR for the Project states that approval of a central wastewater treatment facility on the Property will not create a precedent. The resolutions of the Commission and Board purporting to deny Plaintiff's proposed amendments also purport to reiterate and restate the findings of the FEIR. The Board and Commission are bound by the findings contained in the FEIR that they certified as complete, adequate and accurate. It is arbitrary and capricious for the Commission and Board to find "facts" when certifying an FEIR and then base a decision on the matter addressed by the FEIR on purported findings of the exact opposite "facts." A decision-making process of this sort makes a mockery of findings, the functions they perform as a matter of law and the responsibilities of the Board and Commission in the exercise of their functions.

(3) County has previously approved a central wastewater treatment facility on a comparable project, finding such a facility to be environmentally superior to septic sewage disposal. In 1988, County entered into a Development Agreement for Rancho Solano (prior to annexation of that development to the City of Fairfield) that expressly contemplated a central wastewater treatment facility as the preferred method of wastewater treatment based upon an FEIR — certified by the

Commission and Board as complete, adequate and accurate — that documented the superiority of the central wastewater treatment system over septic sewage disposal. Rancho Solano was approved approximately 8 years after County added the LUCE to its General Plan. In approving the Rancho Solano Development Agreement and the other approvals for the project, the Board found those approvals (and the central wastewater treatment facility) consistent with the LUCE. The LUCE has not been amended in pertinent respects since the Rancho Solano approvals. If there was a precedent — if precedent in these matters is important enough to furnish a basis for a decision — the precedent was Rancho Solano and not the Project. It is arbitrary and capricious for the Board to approve a project with a central wastewater treatment facility as consistent with the LUCE, and then reject a proposed General Plan amendment for another project as inconsistent with the LUCE eight years later purportedly because the proposed amendment would allow such a feature — while claiming that a contrary decision would set a precedent.

(b) *Septic Sewage Disposal As A Density Control.*

The resolution of the Commission and Board denying Plaintiff's proposed general plan amendments that would allow use of a central wastewater treatment facility and requiring use of septic sewage disposal states that subsurface soils conditions — the capacity of the subsurface soil to accept and process wastewater at approved levels of percolation — supersedes all other considerations in the land use decision-making process. Subsurface conditions control what is allowed to occur above ground in terms of land use. Why? Because

septic sewage disposal is the preferred method of wastewater treatment as a matter of County policy. In short, the argument is perfectly circular, starting from a flawed premise. It is true that septic sewage treatment and disposal has typically been used in low-density settings (superseding the use of cesspools and open pits) because low-density residential development has typically been unable to support the greater cost of a central wastewater facility. Thus, septic sewage disposal is an expedient — an inferior solution compelled where the health, safety and environmentally preferred alternative is "too expensive." That consideration has no relevance in a case where the property owner proposes to undertake the added cost. And it does not justify denial of the right to use central wastewater treatment facilities and mandating the use of septic sewage disposal in all cases.

(c) *The Contention That Central Wastewater Treatment Facilities Are Inherently "Urban" Is Mere Word Play.*

A central wastewater treatment facility does not mandate higher density, nor is it any more inherently "urban" than other facilities provided by a central authority such as police, fire, road maintenance, hospitals, libraries, schools, electricity, telephone, cable television, etc. Septic sewage disposal systems require central solid waste facilities to dispose of the accumulated solid septage, if the systems are to function properly and not create health hazards such as those that exist in Green Valley today. Nor did the Board consider a central wastewater treatment facility unacceptably "urban" when it approved the Development Agreement for Rancho Solano and found such a facility

to be consistent with the LUCE nor when it certified the FEIR for the Project. County is required to exercise its police power for purposes of public health, safety, welfare in contemporary terms, taking into account the current condition. But in this case, it adopted a talisman — an anachronistic abstraction — to reach a conclusion contrary to public health and accepted environmental considerations, a conclusion that does not advance legitimate state interests.

23. The Board determined that the density limit in the LUCE should prevail over the density limit in the WCGP and denied Plaintiff's request for a clarifying amendment applying the 2 acres per dwelling unit minimum provided for in the WCGP. The Board resolved the apparent inconsistency between the two plans by relying upon the later adopted plan, despite the fact that it has never repealed or amended the WCGP and continues to apply it as a valid, current part of the General Plan. The Board's action denying Plaintiff's request that development of the Property should be controlled by the density limit in the WCGP rather than the limit contained in the LUCE was arbitrary, capricious and lacking in rational support for the following reasons:

(1) The 2.5 acres per dwelling unit minimum lot size contained in the LUCE is a regulation totally related to septic sewage disposal use. It has no other justification, nor is it based upon any other planning consideration. As the mandate to use septic sewage disposal is contrary to public health, safety and welfare-and therefore void—limitations and requirements to accomodate and facilitate septic sewage disposal are also void.

(2) The 2.5 acres per dwelling unit minimum lot size contained in the LUCE also conflicts with the

planning policies in the WCGP and PUD.5 regulations that favor cluster develcpment to maximize and preserve open space. These overriding policies are nullified by regulations that promote larger lot sizes.

24. Plaintiff is affected by County's denial of its application for approval of General Plan amendments and, as the owner of the Property, is beneficially interested in the outcome of the issues raised by this Petition and Complaint.

25. The general public is also harmed by County's purported exercise of the police power in a manner that does not advance legitimate state interests and its perpetuation of policies that conflict with the public health, safety and welfare.

26. Plaintiff has exhausted its administrative remedies (if such a requirement exists in a matter dealing with actions considered to be legislative in nature) by objecting to the denial of its General Plan amendment proposals at hearings before the Commission and Board and by its written submissions to the Commission and Board. No fact or argument asserted herein that was not raised before the Commission and Board (if any) was required to be so raised.

27. County's denial of Plaintiff's General Plan amendments was a final decision. No variance or other procedure is available to Plaintiff, as any application for use of the Property could not be validly granted under California law unless it could be found consistent with the General Plan and no such finding can be made so long as the General Plan mandates the use of septic sewage disposal and density minimums of one unit per 2.5 acres.

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FIRST CAUSE OF ACTION: ORDINARY MANDATE (CCP Section 1085)

28. Plaintiff incorporates the allegations of paragraphs 1 through 27, inclusive.

29. The actions of the Commission and Board in denying the Plaintiff's applications for amendment to the General Plan to allow (i) central wastewater treatment, and (ii) minimum lot sizes of 2 acres per dwelling unit were arbitrary, capricious, lacking in rational support and failed to advance legitimate state interests. In the case of the Commission's and Board's denial of Plaintiff's request for General Plan amendments that would have allowed use of a central wastewater treatment facility and that instead mandated use of septic sewage disposal, the action of the Board and Commission perpetuates policies and legislation that are contrary to the health, safety and welfare of the citizens of County and are thus void, for failure to serve a valid police power purpose or advance legitimate state interests. As the sole purpose of the 2.5 acre per dwelling unit limitation in the LUCE is to facilitate and accomodate septic sewage disposal, the Board's refusal to apply the WCGP density limit was also arbitrary, capricious, without rational support and should be set aside as void for failure to advance a legitimate state interest.

30. Plaintiff has no adequate remedy at law for the injury it has suffered as a result of County's actions. Without the General Plan amendments that it has requested, it cannot develop the Property for an economic beneficial use consitent with its right to have its applications considered and acted upon in a manner that is not arbitrary and capricious.

31. In seeking to establish the right to use a central wastewater treatment facility in lieu of septic sewage disposal, Plaintiff seeks to reverse County policy that perpetuates

an environmentally inferior system of wastewater disposal and failed to carry out state policy to reclaim water. County's requirement that septic sewage disposal be used is inimical to the public health of the citizens of County generally, particularly as County has admitted its inability to monitor and enforce the maintenance and operation of septic sewage facilities to insure protection of health. In reversing such policies and compelling County, Board and Commission to adopt policies and regulations that are consistent with the public health, encourage more environmentally sensitive wastewater treatment solutions and that require County to recognize its own inability to monitor and enforce the regulations needed to make the use of septic tanks minimally safe, Plaintiffs are enforcing important public rights and conferring a substantial public benefit upon the citizens of County. Plaintiff's expense in bringing and prosecuting this action is out of proportion with its individual stake in the matter and the public benefit that it actions will confer. For that reason, Plaintiff is entitled to recover its attorneys' fees under Code of Civil Procedure Section 1021.5 and under Government Code Section 800.

WHEREFORE, Plaintiff respectfully requests relief as hereinafter set forth.

SECOND CAUSE OF ACTION: DECLARATORY RELIEF

32. Plaintiff repleads the allegations of paragraphs 1 through 27 and 31, inclusive.

33. A case or controversy exists between the parties as follows:

(a) Plaintiff contends that all portions of County's General Plan that require use of septic sewage disposal

facilities and prevent use of a central wastewater treatment facility, in any case where a property owner or applicant is willing to construct and provide for operation of such a facility as part of its development in accordance with all applicable law, conflicts with public health, safety and welfare in that it perpetuates and supports use of a system that is environmentally inferior and a threat to public health, particularly in light of County's admitted inability to monitor and enforce safety regulations with respect to such systems. A local governing body such as County cannot lawfully promulgate and continue in force purported police power regulations that do not serve public health, safety and welfare. Therefore, all of the provisions of County's General Plan that require use of septic sewage disposal and prevent use of central wastewater treatment facilities are void.

(b) Plaintiff contends that, as the 2.5 acre per dwelling unit limitation in the LUCE was adopted solely to facilitate and accommodate septic sewage treatment on the lots, it should be declared void whenever central wastewater treatment is provided.

(b) Plaintiff is informed and believes and thereon alleges that County, the Board and Commission dispute all of the foregoing contentions.

WHEREFORE, Plaintiff respectfully requests relief as hereinafter set forth.

THIRD CAUSE OF ACTION: DAMAGES FOR DENIAL OF PLAINTIFF'S CIVIL RIGHTS — VIOLATION OF SUBSTANTIVE DUE PROCESS OF LAW GUARANTEED BY ARTICLE I,

APPENDIX D

§ 7(a) OF THE CALIFORNIA CONSTITUTION AND THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

34. Plaintiff repleads the allegations of paragraphs 1 through 27 and 31, inclusive.

35. 42 U.S.C. Section 1983 provides that a party that has been deprived of its civil rights by action of state or local government, or officers of state or local government, are entitled to recover damages by reason of such deprivation, including their reasonable attorneys' fees incurred to obtain vindication of their civil rights.

36. Actions of a local governing body in matters pertaining to land use regulation that are arbitrary, capricious, lacking in rational support and that do not bear a substantial relation to the public health, safety and general welfare in their application to Plaintiff violate Plaintiff's rights to substantive and procedural due process of law and to the right to be free of takings or deprivations of property without just compensation, all as protected by the Fifth and Fourteenth Amendments of the United States Constitution and Article I, § 7(a) of the Constitution of the State of California. Plaintiff is entitled to damages for violation of its civil rights in the amount that it will prove at trial.

37. As a direct and proximate result of County's conduct, Plaintiff has been compelled to employ counsel to protect its rights. Plaintiff is entitled to recover its attorneys' fees and litigation costs under 42 U.S.C. § 1988.

WHEREFORE, Plaintiff respectfully requests relief as hereinafter set forth.

APPENDIX D

FOURTH CAUSE OF ACTION: DAMAGES FOR INVERSE CONDEMNATION

38. Plaintiff repleads the allegations of paragraphs 1 through 27, 31 and 37, inclusive.

39. In denying Plaintiff's request for General Plan Amendments that would allow for use of a central wastewater treatment facility on the Property, County, Board and Commission have made a final determination of policy that will control any development of the Property, because no such development can proceed unless it is found consistent with the General Plan that mandates use of septic sewage disposal facilities. County, Board and Commission have adopted and reaffirmed a policy that lies outside the scope of the police power and that does not serve a public purpose.

40. The actions of the Board and Commission have denied to Plaintiff its reasonable, investmentbacked expectations that the Property would be developable under a system of valid, rationally based development constraints. Such expectations were reasonable under the facts and circumstances herein alleged, including, but without limitation, the Property's unique status under Proposition A.

41. Regulatory actions that (i) do not substantially advance legitimate state interests but that nonetheless restrict use and development of real property, or (ii) deny to property owners their reasonable, investment-backed expectations, or (iii) restrict the use of land in an arbitrary and capricious manner that bears no substantial relationship to public health, safety or welfare, constitute "takings" for which Plaintiff is entitled to just compensation pursuant the Fifth and Fourteenth Amendments of the United Stated Constitution and Article 1, § 19 of the Constitution of the State of California.

42. County has made it clear that it will not approve a proposed project on the Property that uses a central wastewater treatment facility even though (i) the certified FEIR for the Project and for the previously approved Rancho Solano project find such a facility to be an environmentally superior method of treating wastewater, and (ii) Plaintiff is informed and believes that County's own health officials know that septic sewage disposal is inferior to the point of posing a risk to public health. There is no economically beneficial or productive use of the Property that can meet this arbitrarily imposed standard.

43. County knows that any development proposal for the Property that does not include a central wastewater treatment facility with deny to Plaintiff its distinct, investment-backed expectations. Nevertheless, County arbitrarily refuses to permit such a facility, instead mandating the use of septic sewage disposal while ignoring the health risks inherent in such a policy.

44. It would be futile for Plaintiff to submit any further General Plan amendment proposals as both the Board and Commission have acted on this matter, stating that their conclusions will not be changed, imposing arbitrary limitations on development that deny to Plaintiff the right to make economically beneficial or productive use of the Property.

45. As a direct and proximate result of County's conduct, Plaintiff has been damaged in an amount to be proven at trial, but that exceeds $5 million.

46. As a direct and proximate result of County's conduct, Plaintiff has been compelled to employ counsel to protect its rights. Plaintiff is entitled to recover its attorneys' fees and litigation costs under Code of Civil Procedure § 1036 and 42 U.S.C. § 1988.

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WHEREFORE, Plaintiff respectfully requests relief as follows:

1. A Judgment of this Court issuing its Writ Of Mandate directing Board to set aside its decision denying the General Plan amendments proposed by Plaintiff and directing Board to adopt the amendments.

2. A Judgment declaring that all provisions of County's General Plan mandating the use of septic sewage disposal and disallowing use of central wastewater treatment facilities (i) are contrary to public health, safety and welfare, (ii) do not substantially advance legitimate state interests (iii) are invalid as purported exercises of the police power, and (iv) are therefore void.

3. A Judgment awarding to Plaintiff damages for violation of its civil rights in such amount as Plaintiff may prove at trial.

4. A Judgment awarding to Plaintiff just compensation for taking of its property rights in such amount as Plaintiff may prove at trial.

5. A Judgment awarding to Plaintiff its attorneys fees under Code of Civil Procedure § 1021.5 and Government Code § 800 in connection with the relief obtained pursuant to paragraphs 1 and 2 above; and under 42 U.S.C. § 1988 for the Judgment awarded under paragraph 3 above and Code of Civil Procedure § 1036 and 42 U.S.C. § 1988 for the Judgment awarded under paragraph 4 above.

6. An award to Plaintiff of its costs.

7. A Judgment awarding to Plaintiff such other relief as the Court deems just.

APPENDIX D

Dated: August 29, 1995.

HOWARD N. ELLMAN
KENNETH N. BURNS
ELLMAN, BURKE, HOFFMAN & JOHNSON, *a Professional corporation,*

HOWARD N. ELLMAN, *Attorneys for Plaintiff and Petitioner* WHITE WING DEVELOPMENT, INC.

APPENDIX D

VERIFICATION

I am the President of White Wing Development, Inc., Plaintiff herein, and am authorized to make this verification on Plaintiff's behalf. I have read the foregoing Complaint and am familiar with the subject matter. To the best of my knowledge, information and belief, the matters stated therein are true and on that basis I verify that they are true.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct, and that this declaration is executed on August 29, 1995.

_____

J. David Carroll

APPENDIX D

LEGAL DESCRIPTION

REAL PROPERTY in an unincorporated area, County of Solano, State of California, described as follows:

Parcels "A" and "B", and that area shown as (Unsurveyed Remainder), as shown on the Map filed in the Office of the Recorder of Solano County, California on November 23, 1981 in Book 22 of Parcel Maps at Page 93.

A.P. Nos. 153-060-010, 020 and 030;
153-070-010 and 020;
153-080-010, 020, 030, 040 and 050;
153-140-040; 153-240-010 and 153-250-140

* * * *

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APPENDIX E

RESOLUTION NO. 95-150

RESOLUTION OF THE BOARD OF SUPERVISORS OF SOLANO COUNTY DENYING GENERAL PLAN AMENDMENT APPLICATION NO. G-90-01 OF WHITE WING ASSOCIATES EXCEPT FOR THE PROVISION TO IMPLEMENT THE POLICY PLAN OVERLAY (PP) DISTRICT PROCESS FOR A RURAL RESIDENTIAL PUD DESIGNATION

WHEREAS, the Solano County Board of Supervisors has duly considered, in public hearing, General Plan Amendment Application No. G-90-01 of White Wing Associates to amend various elements of the Solano County General Plan to accommodate a planned unit development proposal which includes 598 single-family residential lots, an 18-hole golf course, golf course clubhouse and ancillary tennis, swimming and putting green facilities for club members, 629 acres of private open space, public and private roads, public utilities, SID water and an on-site public sewage facility, located on the north side of Rockville Road between Suisun and Green Valley Roads; and

WHEREAS, the application to amend the General Plan includes various changes to accommodate a planned unit development proposed by White Wing Associates and are listed in Section 4.1 of the Final EIR (Vol. 1, Page 4.1-1); and

WHEREAS, the Board has reviewed the report and recommendation of the Planning Commission and the Department of Environmental Management and has heard testimony relative to the application; and

WHEREAS, the EIR for the proposed amendments to the Solano County General Plan was processed by the

Department of Environmental Management pursuant to the California Environmental Quality Act and the State and County EIR Guidelines; and

WHEREAS, the Final EIR prepared for General Plan Amendment No. G-90-01 was considered by the Solano County Board of Supervisors and certified pursuant to Resolution No. 93-271 adopted on December 14, 1993; and

WHEREAS, the Board of Supervisors does reaffirm that the Final EIR prepared for Amendment Nos. A2 and A3c as described in Exhibit A attached hereto is adequate pursuant to the requirements of the California Environmental Quality Act and

WHEREAS, after due consideration, the Board of Supervisors determined that the General Plan should not be amended to allow public sewage disposal facilities in the rural residential area designated PUD (.5) by the West Central Solano County General Plan for the following reasons:

1. The principal housing role of the unincorporated County is to accommodate agriculture and a moderate amount of rural residential housing, where only a minimal level of public services are provided; and
2. Rural residential development should be self-sufficient with respect to sewage disposal, and should rely on approved individual, on-site septic systems; new development which requires public sewer service should be located within incorporated cities, and
3. The present requirement for individual on-site septic systems establishes a physical limitation on the potential development density of rural residential areas; to allow a public sewage disposal facility for this site could set a precedent for allowing public sewage disposal facilities in

other rural residential areas, thereby increasing the potential development densities of those areas beyond their present limits; and

WHEREAS, the Board of Supervisors determined that the General Plan should not be amended to allow a development density of one unit per two acres on the project site for the following reasons:

1. The West Central Solano County General Plan Element designates the project site Very Low Density Residential and establishes a maximum development density of up to 0.5 of a residential unit per gross acre (1 unit per 2 gross acres); gross acreage includes not only the net area required for actual residential use, but also the area required for minor and collector streets, utilities, and public open space for recreation corridors required to serve the housing area involved; and

2. The Land Use and Circulation Element designates the project site as Rural Residential and establishes a maximum development density of one residential unit per 2.5 acre building site, if served by a public water supply: the Land Use and Circulation Element defines densities in terms of building site area or "net" acreage rather than "gross" acreage; and

3. Because all elements of the County's General Plan must be consistent, the adoption of the Land Use and Circulation Element in 1980 has the effect of lowering the maximum allowable density on the project site; and

4. Because individual on-site septic systems require a minimum building site area of 2.5 acres, the density greater than one unit per 2.5 net acres unless the General Plan were amended to allow public sewage disposal facilities on the project site; and

5. The public would have a better understanding of the interrelationship between the various elements of the General Plan if the text and diagram of the West Central Solano County General Plan Element were amended to reflect the maximum development densities for Rural Residential areas as established in the Land Use and Circulation Element; and

WHEREAS, the Board of Supervisors determined that the General Plan should not be amended to include active and passive recreation land uses, such as golf, tennis, swimming, hiking, biking and equestrian activities in residential areas designated for planned unit development (PUD) for the following reasons:

1. It was not demonstrated that the proposed golf course and ancillary facilities met the particular needs of Solano County residents.

2. The project concept for private recreational facilities was more intense than that encouraged by County policy.

3. The design of proposed golf course and ancillary facilities did not minimize adverse impacts on surrounding residential, agricultural and open space uses.

WHEREAS, the Board of Supervisors determined that the General Plan should not be amended to allow private open space, such as a golf course, to count towards gross acreage when calculating residential density under the West Central Solano County General Plan Element because the primary role of such private open space is to provide an active recreational use to the outside community rather than a passive visual use to the housing area involved; and

WHEREAS, the Board of Supervisors determined that the General Plan should be amended to implement the Policy Plan Overlay (PP) District ordinance process in rural

residential areas where a Planned Unit Development (PUD) designation has been applied.

NOW, THEREFORE, BE IT RESOLVED, that

I. On motion of supervisor Carroll and seconded by Supervisor Goikovich the Board of Supervisors does hereby DENY Amendment Nos. A7 and A8 proposed to change county policy to allow a public sewage disposal facility in a Rural Residential District by the following vote:

AYES: Supervisors Carroll, Goikovich, Thomson and Chairwoman Kondylis

NOES: Supervisor Schlenker

ABSTAIN: Supervisors None

ABSENT: Supervisors None

II. On motion of Supervisor Carroll and seconded by Supervisor Schlenker the Board of Supervisors does hereby DENY Amendment Nos. A1, A3a and A3b proposed to add 1 unit/2.0 acre density to the Rural Residential District by the following vote:

AYES: Supervisors Carroll, Goikovich, Schlenker, Thompson and Chairwoman Kondylis

NOES: Supervisors None

ABSTAIN: Supervisors None

ABSENT: Supervisors None

III. On motion of Supervisor Carroll and seconded by Supervisor Goikovich the Board of Supervisors does hereby DENY Amendment Nos. C1, A4 and A6 proposed to allow a golf course and ancillary facili-

ties to be included as part of the General Plan Land Use Designation by the following vote:

AYES: Supervisors Carroll, Goikovich, Schlenker, Thomson and Chairwoman Kondylis

NOES: Supervisors None

ABSTAIN: Supervisors None

ABSENT: Supervisors None

IV. On motion of Supervisor Carroll and seconded by Supervisor Goikovich the Board of Supervisors does hereby DENY Amendment No. B1 proposed to allow the private golf course acreage to be included in the calculation of the allowable residential density by the following vote:

AYES: Supervisors Carroll, Goikovich, Thomson and Chairwoman Kondylis

NOES: Supervisor Schlenker

ABSTAIN: Supervisors None

ABSENT: Supervisors None

V. On motion of Supervisor Carroll and seconded by Supervisor Schlenker the Board of Supervisors does hereby APPROVE and ENACT Amendment Nos. A2 and A3c identified in the Final EIR, proposed by White Wing Associates and further described in Exhibit A attached and made part of this resolution that would implement the Policy Plan Overlay (PP) District process where a (PUD) designation has been applied in a rural residential area by the following vote:

AYES: Supervisors Carroll, Goikovich, Schlenker, Thomson and Chairwoman Kondylis

NOES: Supervisors None

ABSTAIN: Supervisors None

ABSENT: Supervisors None

I, LINDA TERRA, Clerk of the Board of Supervisors, of the County of Solano, State of California, do hereby certify that the foregoing actions were introduced, passed and adopted by said Board at a special meeting thereof held on July 5, 1995.

WITNESS my hand and seal of said Board this 5th day of July, 1995.

LINDA TERRA
Clerk of the Board of Supervisors

By: /s/ LINDA TERRA

APPENDIX E

EXHIBIT A

AMENDMENTS TO THE SOLANO COUNTY GENERAL PLAN APPROVED BY THE SOLANO COUNTY BOARD OF SUPERVISORS AS PART OF GENERAL PLAN AMENDMENT APPLICATION NO. G-90-01 OF WHITE WING ASSOCIATES

Amend the Land Use and Circulation Element by amending the text on page 76, paragraph 3 (Amendment No. A2) to read as follows:

> "The 1 unit per 10 acres designation is intended to buffer higher density rural residential development and the County's essential agricultural lands. In areas where a planned unit development (PUD) designation has been applied, development proposals should be comprehensively planned and developed under the County's Policy Plan Overlay (PP) District process. This approach allows flexibility in building sites, mixtures of land use, usable open space and the preservation of significant natural features."

Amend the Land Use and Circulation Element by adding a new Policy #9, page 78 (Amendment No. A3(c)) to read as follows:

> "Where a planned unit development (PUD) designation has been applied on sites intended for rural residential development, development proposals for such sites shall be comprehensively planned and formulated utilizing the County's Policy Plan Overlay (PP) District process. The PUD designation shall permit a

mixture of uses including rural residential or clustered residential where deemed desirable to preserve natural resources and to maximize open space."

Supreme Court, U.S.
FILED
APR 9 1997
OFFICE OF THE CLERK

No. 96-1067

In The

Supreme Court of the United States

October Term, 1996

White Wing Development, Inc., a California Corporation, dba White Wing Associates,

Petitioner,

vs.

County of Solano, Board of Supervisors of the County of Solano, Planning Commission of the County of Solano,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DENNIS BUNTING,
County Counsel
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Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether this Court should grant certiorari to determine if a 15-year-old county land-use regulation, which mandates that all rural residential development dispose of household wastewater through individual septic systems, effected a facial regulatory taking of petitioner's subsequently acquired property rights, when the state courts below concluded that they were jurisdictionally timebarred under state law from deciding this constitutional issue.

2. Whether this Court should grant certiorari to determine if a landowner's claim that a 15-year-old regulation effected a facial taking is still ripe for adjudication despite the expiration of the applicable state law statute of limitations.

3. Whether this Court should grant certiorari to reconsider if the constitutional doctrine of separation of powers prevents a court from ordering a local legislative body to enact a proposed land-use regulation.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

I. STATEMENT OF THE CASE

In this case, Petitioner challenges two separate legislative actions taken by Respondent COUNTY OF SOLANO ("County"), through its Board of Supervisors. The first challenged action is the County's enactment of a land-use regulation in 1980; the second is the County's denial of Petitioner's proposed amendments to that regulation in 1995. The state courts below applied well-established rules of law and denied Petitioner's request for judicial relief. As to the County's enactment of the land-use regulation, the courts held that a *facial* challenge alleging a regulatory taking must be brought within the relevant statute of limitations. As to the County's denial of Petitioner's proposed legislation in 1995, the courts held that, while a court may adjudicate the constitutionality of legislative enactments, it may not order a legislative body to enact proposed legislation.

A. Facts Material to the Questions Presented

Solano County is situated northeast of San Francisco Bay; the western quarter of the county extends into the foothills of California's Coast Range, while the eastern portion is part of the Central Valley. Due to this geography, the predominant land use in the western unincorporated areas of the county is low density suburban homes, locally referred to as Rural Residential development, while most of the eastern areas of the county are devoted to agriculture.

In 1980, the County adopted the Land Use and Circulation Element ("LUCE") of the Solano County General Plan. This planning document includes various land-use policies and regulation, two of which are material to this case. First, the LUCE designates approximately 14,000 acres, primarily in the western non-agricultural portion of the county, for Rural Residential development, i.e., one dwelling unit per 2.5 to 10 acres. Second, all new development throughout the unincorporated areas of the county must use on-site sewage disposal systems. This sewage disposal policy is the crux of this litigation, and will be referred to hereinafter as the "septic system requirement." The stated legislative purpose for this septic system requirement was to confine new development requiring public sewer service to areas within incorporated cities.

In the early 1990's, Petitioner purchased 1220 acres of undeveloped Rural Residential land in the northwestern portion of the county.[1] Petitioner was fully aware of the County's septic system requirement at the time it

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[1] Petitioner's ultimate objective for the property was to develop an up-scale community with approximately 600 homes in several development clusters surrounding a golf course and club house. It is undisputed that a development project with this design and intensity would require that the houses be connected to a public sewage treatment system rather than utilize individual septic systems. It is commonly assumed that, because of geologic and soil conditions, Petitioner's 1220-acre property could safely accommodate between 300 and 400 individual household septic systems. In its petition for writ of certiorari, Petitioner does not contend that the County's septic system requirement deprives it of all economically beneficial or productive use of its property.

acquired the property. Petitioner's predecessor in interest had filed an application for a general plan amendment that would have exempted the 1220-acre property from the septic system requirement, and the application was still pending when Petitioner acquired the property. The proposed general plan amendment was eventually considered and denied by the Board of Supervisors at a public hearing on July 5, 1995. (Petitioner's Appendix E.)

B. Manner In Which the State Courts Passed on the Federal Questions

Petitioner filed an action in the Superior Court challenging the County's denial of the proposed general plan amendment. (Petitioner's Appendix D.) Petitioner argued that the County's denial of the legislative proposal was an abuse of legislative discretion (first cause of action), a violation of Petitioner's substantive due process right to be free from an uncompensated taking (third cause of action), and an inverse condemnation of Petitioner's property for which compensation was required (fourth cause of action).[2] On these causes of action, Petitioner prayed for a judicial writ directing the County to enact the proposed legislation and for an award of damages and compensation. (Petitioner's Appendix D, p. 30, ¶¶ 1, 3 & 4.)

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[2] It is not entirely clear whether Petitioner's third and fourth causes of action are directed at the County's 1995 decision to deny the proposed general plan amendments, or at the county-wide septic system requirement enacted in 1980. This ambiguity continues on in the petition for writ of certiorari.

In its second cause of action, Petitioner argued that the County's septic system requirement, enacted in 1980, was facially unconstitutional because it did not substantially advance a legitimate state interest; Petitioners asked the court to issue a judicial declaration to this effect. (Petitioner's Appendix D, p. 30, ¶ 2.)

The County demurred to all causes of action. As to the causes of action contesting the County's 1995 denial of Petitioner's proposed general plan amendment, the County argued that a local legislative body's decision not to enact proposed legislation was not subject to judicial review under the separation of powers doctrine. To the extent that Petitioner's substantive due process and inverse condemnation claims were predicated upon the County's decision not to enact the proposed legislation, such claims were also barred by the doctrine. As to the cause(s) of action contesting the County's 1980 enactment of the septic system requirement, the County argued that such claims were timebarred by a 120-day statute of limitations imposed by state law.

The Superior Court sustained the County's demurrer, without leave to amend, and entered a judgment dismissing the action. (Petitioner's Appendix C.) The Superior Court concluded that the Petitioner was asking the court to perform a legislative function, which the court could not do, due to the constitutional doctrine of separation of powers. Implicit in the Superior Court's decision sustaining the demurrer is its conclusion that Petitioner's challenge to the County's 1980 enactment of the septic system requirement was timebarred under the relevant statute of limitations.

Petitioner appealed, on all causes of action, to California's Court of Appeal, First Appellate District. On appeal, both sides raised the same issues and arguments that had been raised in the Superior Court. In an unpublished decision (Petitioner's Appendix A), the Court of Appeal affirmed the Superior Court's judgement. The Court of Appeal held that Petitioner's challenges to the County's 1995 denial of the proposed general plan amendment "improperly sought to compel performance of a legislative act involving a policy determination and the exercise of discretion." (Petitioner's Appendix A, p. 9.) As to Petitioner's constitutional claims, the Court of Appeal held:

> Plaintiff specifically sought a declaration that all provisions of the County's general plan mandating the use of septic sewage disposal and disallowing use of central wastewater treatment facilities are contrary to public health, safety, and welfare, do not substantially advance a legitimate state interest, are invalid as purported exercises of the police power, and are therefore void. This attack on the general plan and its elements is clearly timebarred.

(Petitioner's Appendix A, pp. 11 – 12.)

In dicta, the Court of Appeal commented that the County's 1995 decision not to amend its general plan was not an abuse of legislative discretion:

> The Solano County General Plan also seeks to channel new development and growth toward already developed areas. A 'cornerstone principle' of the plan is the direction of new urban development and growth toward municipal areas. To foster that policy, the general plan

> confines new development requiring public sewer service to areas located in incorporated cities. Rural development in unincorporated areas must rely on individual on-site sewage treatment systems, and that development is limited to the carrying capacity of the land. While we cannot say whether this policy is the best for the County, nor can we say it is irrational or arbitrary or an abuse of discretion.

(Petitioner's Appendix A, pp. 9-10.)

Petitioner timely filed a petition for discretionary review with the California Supreme Court. The state Supreme Court denied the petition on October 16, 1996. (Petitioner's Appendix B.)

C. Correction of Misstatements in the Petition

Throughout this litigation, many of Petitioner's claims and arguments have been vague as to whether they were directed against the County's 1995 decision not to amend the general plan, or against the land-use regulation enacted in 1980. In essence, Petitioner has tried to argue that the County's 1995 decision *not to enact* a special sewage disposal regulation for its property was equivalent to *re-enacting* the 1980 county-wide regulation, thereby commencing a new statute of limitations for testing the *facial* constitutionality of that 15-year-old regulation. This vagueness continues in the petition for writ of certiorari, and colors the questions presented for review by Petitioner.

The County's 1995 decision must be seen for what it was and nothing more. It was *not* a consideration of all

possible regulatory options related to sewage disposal, followed by the enactment of a comprehensive regulatory scheme that the County had determined would best protect public health, safety and welfare. Rather, it was simply a decision that Petitioner's proposed special exemption for its own property was not an appropriate amendment to the existing regulatory system.

In its statement of the case, Petitioner fails to mention that the statute of limitations was a fundamental issue in this litigation, and was in fact the basis on which the Court of Appeal held that it could not address the facial constitutionality of the County's septic system requirement. As a result, the courts below have not directly addressed whether a county-wide septic system requirement constitutes a regulatory taking, but have instead concluded that they were jurisdictionally timebarred under California law from deciding the constitutional issue in this case.

II. REASONS FOR DENYING THE WRIT

A. The State Courts Below Declined to Address Petitioner's Constitutional Takings Claims, Ruling That Such Claims Were Timebarred by California's Statute of Limitations

At the time that Petitioner commenced this action, California law required that any action "to attack, review, set aside, void or annul the decision of a legislative body to adopt or amend a general plan" be commenced and

served within 120 days after the legislative body's decision. *See* CAL. GOV'T CODE, § 65009, subd. (c)(1), (Deering Supp. 1997).[3]

California courts have held that any challenge to the *facial* validity of a land-use regulation is subject to this statute of limitations. *Hensler v. City of Glendale*, 8 Cal.4th 1, 22, 876 P.2d 1043, 32 Cal.Rptr. 244 (1994). This is so regardless of whether the requested remedy is declaratory relief, money damages or inverse condemnation. *Freeman v. City of Beverly Hills*, 27 Cal.App.4th 892, 896-897, 32 Cal.Rptr. 731 (1994).[4]

In this case, the state courts below properly recognized that Petitioner's constitutional claim of regulatory taking was a *facial* challenge to the septic system requirement which the County had enacted in 1980, rather than an attack on the County's 1995 decision not to amend that

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[3] This subdivision was amended, effective January 1, 1996, to shorten the statute of limitations to 90 days. (1995 Cal. Stat. ch. 253, § 1.)

[4] The Ninth Circuit has held that the limitations period for a civil rights action in California brought under 42 U.S.C. § 1983, based on the enactment of an ordinance, is one year from the date of enactment; in addition, if the ordinance is subsequently amended, a new claim does not accrue unless the amendment substantively impacts the claimant. *De Anza Properties X, Ltd. v. County of Santa Cruz*, 936 F.2d 1084, 1085-1086 (9th Cir. 1991). This one year statute of limitations applies to all federally based claims of unjust taking. *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992) (*Azul II*), *cert. denied*, 506 U.S. 1081 (1993). To the extent there might be an eight or nine month discrepancy between the statutes of limitations for bringing state and federal constitutional claims, this case is not the proper vehicle for addressing such a possible conflict.

pre-existing regulation. Applying the statute of limitations described above, the state courts concluded that they were jurisdictionally timebarred from deciding whether the County's septic system requirement constituted a regulatory taking of Petitioner's property rights.[5]

The Court has expressed a strong disinclination to consider any claims that were not addressed below by the state courts which heard a case. *Yee v. Escondido*, 503 U.S. 519, 533 (1992) (citing *Illinois v. Gates*, 462 U.S. 213, 218-220 (1983)). The Court's cautionary observations in *Yee* are equally applicable to this case:

> Prudence . . . dictates awaiting a case in which the issue was fully litigated below, so that we will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question. . . . In fact, were we to

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[5] In dicta, the Court of Appeal commented that the County's septic system requirement was not an irrational method for directing new development toward existing urban areas, and analogized the County's regulation to an initiative that was upheld by the California Supreme Court in *De Vita v. County of Napa*, 9 Cal.4th 763, 792, 889 P.2d 1019, 38 Cal.Rptr. 699 (1995). (Petitioner's Appendix A, pp. 9-10.) In *De Vita*, 9 Cal.4th at 792, the California Supreme Court stated that a land-use regulation which directed future development toward existing urban areas was consistent with the basic purposes of local land-use planning. However, the fact that the Court of Appeal included this dictum in its unpublished opinion is not a sufficient reason for the Court to grant certiorari, because an intermediate appellate courts' dictum which agrees with a state supreme court's reasoning is not the equivalent of "a state court of last resort [deciding] an important federal question in a way that conflicts with the decisions of another state court of last resort or of a United States court of appeal." *See* Sup. Ct. R. 10(b).

> address the issue here, we would apparently be the first court in the Nation to determine whether an ordinance like this one effects a regulatory taking. . . . We leave the regulatory taking issue for the California courts to address in the first instance.

Id., 503 U.S., at 538.

Because the state courts hearing this case declined to address Petitioner's constitutional takings claims, leaving that issue unlitigated below, a grant of certiorari is not appropriate here.

B. It is Well Established That the *Facial* Constitutionality of a Land-use Regulation Is Ripe for Adjudication as Soon as the Regulation Is Enacted

Petitioner's ripeness argument is not entirely clear. In its second question presented for review, Petitioner seems to be asking the Court to decide whether a property owner's unsuccessful attempt to amend a 15-year-old regulation renders the *facial* constitutionality of that regulation ripe for adjudication. However, at page 21 of its petition for writ of certiorari, Petitioner states, "The ripeness doctrine has no application to the issue that White Wing brings to this Court." With this unequivocal declaration, Petitioner appears to be admitting that its second question presented for review does not justify certiorari.

Nevertheless, the ripeness issue deserves brief comment. In *Yee*, the Court explained that a *facial* challenge which alleges that an ordinance does not substantially advance a legitimate state interest is ripe for adjudication

as soon as the ordinance is enacted. *Yee v. Escondido*, 503 U.S. at 534. Therefore, the *facial* constitutionality of the County's septic system requirement was ripe for adjudication as soon as that regulation was enacted in 1980.

However, once a claim becomes ripe, it will not remain so indefinitely; even a legitimate claim will become "stale" if not properly asserted within a reasonable period of time. A legislatively established statute of limitations defines the period of time that is deemed to be "reasonable" in any particular situation. Statutory limitation periods are based on the theory that, through the passage of time, the right to be free of stale claims comes to prevail over the right to prosecute them. *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944).

Petitioner's novel theory seems to be that stale claims are "refreshed" and made justiciable once again whenever a legislative body declines to amend an allegedly unconstitutional regulation. In other words, anyone can purchase an exemption to the statute of limitations simply by drafting a legislative amendment and paying the required application fee. Petitioner has failed to cite any legal authority to support this theory.

The statute of limitation has always presented an absolute barrier to any claimant who "has slept on his rights."[6] With its petition for writ of certiorari, Petitioner

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[6] In *Burnett v. New York Central R. Co.*, 380 U.S. 424, 428 (1965), the Court identified various objectives which are served by statutes of limitations, and commented, "Moreover, the courts ought to be relieved of trying stale claims when a plaintiff has slept on his rights."

is recommending that the Court consider installing a toll gate through that otherwise impenetrable barrier. Petitioner's suggestion does not warrant serious consideration.

C. It is Well Established That the Separation of Powers Doctrine Does Not Prevent a Court From Adjudicating the Constitutionality of Legislation in Response To a Timely Challenge

Contrary to Petitioner's implication, the state courts below did not invoke the separation of powers doctrine to avoid constitutional review of the County's 1980 septic system requirement. Rather, the courts below concluded that the statute of limitations left them without jurisdiction to adjudicate a *facial* takings claim aimed at that 15-year-old regulation.

The Court of Appeal's opinion clearly indicates that the separation of powers doctrine acted as a bar only to Petitioner's attack on the County's 1995 *denial* of the proposed general plan amendment.[7] The Court of Appeals explained that the doctrine prevented a court from ordering a legislative body to enact a legislative proposal, except where the body lacked discretion to do otherwise. (Petitioner's Appendix A, pp. 5-6.) The Court of Appeal held that the County's 1995 decision whether to enact Petitioner's proposed general plan amendment was "a legislative act involving a policy determination

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[7] Obviously, if the County had decided to *enact* Petitioner's proposed general plan amendment, the separation of powers doctrine would not have prevented a court from reviewing the constitutionality of that newly-enacted legislative amendment.

and the exercise of discretion." (Petitioner's Appendix A, p. 9.)

Petitioner's third question presented for review relies on at least two assumptions:[8] first, that the County's septic system requirement effected a compensable taking of property rights upon its enactment; second, that Petitioner sought to test the constitutionality of the regulation in a timely manner. Petitioner's question should be rephrased to state these assumptions explicitly, as follows: "Supposing that the County's regulation effected a *facial* taking of a protectable property interest, does the separation of powers doctrine prevent a court from granting an affected landowner effective relief when such relief is sought in a timely manner?"

The Court answered this question a decade ago when it explained, "Once a court determines that a taking has occurred, the government retains the whole range of options already available – amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain." *First Lutheran Church v. Los Angeles County*, 482 U.S. 304, 321 (1987). In other words, the separation of powers doctrine does not prevent a court from ordering a legislative body to take corrective action, but that doctrine does prevent a court from limiting a legislative body's discretion to choose from among three equally acceptable alternatives. Certiorari in this case is not warranted because Petitioner has offered no reason

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[8] Petitioner's third question also assumes that Petitioner is an affected landowner who has standing to challenge the 1980 enactment. The complete lack of any factual support for this assumption is discussed under heading II.D., below.

why the Court should reconsider its language in *First Lutheran*.

D. Petitioner Has Failed to Identify Any Protectable Property Interest That Has Been Adversely Affected by the County's Actions

If the statute of limitations had not presented such a decisive barrier to Petitioner's constitutional claim,[9] Petitioner would not have been able to demonstrate standing to assert that claim because Petitioner did not acquire its property until long after the alleged "taking" occurred. Even if the County's 1980 enactment of the septic system requirement "took" a protectable property right from all landowners whose properties became subject to that county-wide regulation, and thereby reduced the value of all such properties, Petitioner could not have suffered any injury as a result. When Petitioner purchased the 1220-acre property in the early 1990's, the fair market value of the property would have reflected the development restrictions in place at that time.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court stated that compensation was not required when the property interest allegedly "taken" by a regulation was not part of the landowner's title to begin with. *Id.*, 505 U.S. at 1027.

> This accords, we think, with our "takings" jurisprudence, which has traditionally been guided

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[9] For example, suppose for the sake of argument that California law imposed a 15-year statute of limitations for commencing general plan challenges.

> by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures *newly enacted* by the State in the legitimate exercise of its police powers. . . .
>
> . . . Any limitation [that prohibits all economically beneficial use of land] cannot be *newly legislated or decreed* (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.

Id., 505 U.S. at 1027-1029 [emphasis added].

Nor has Petitioner alleged facts sufficient to show that it had standing to assert a constitutional takings claim based on the County's 1995 denial of its proposed general plan amendment. Even if *existing* septic systems are causing water pollution problems in the vicinity of Petitioner's property, Petitioner has failed to explain how its proposed legislation could have improved that *existing* situation. Petitioner seems to argue that its proposed regulatory amendment would have reduced the possibility that Petitioner might create *new* water pollution problems on its own property. However, it is undisputed that Petitioner continues to have the right, and the obligation, to design, construct and maintain non-polluting septic systems in conjunction with any development on its

property. The County's action in 1995 did not take anything away from the bundle of property rights that Petitioner acquired when it purchased the property.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

DATED: April 9, 1997

Respectfully submitted,

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Supreme Court, U.S.
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No. 96-1067

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

WHITE WING DEVELOPMENT, INC.,
A CALIFORNIA CORPORATION,
DBA WHITE WING ASSOCIATES,
Petitioner,
VS.
COUNTY OF SOLANO,
BOARD OF SUPERVISORS OF THE COUNTY OF SOLANO,
PLANNING COMMISSION OF THE COUNTY OF SOLANO,
Respondents.

On Petition for Writ Of Certiorari
To The California Court of Appeal

REPLY BRIEF IN SUPPORT OF PETITION OF CERTIORARI

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On Petition for Writ Of Certiorari
To The California Court of Appeal

REPLY BRIEF IN SUPPORT OF PETITION OF CERTIORARI

INTRODUCTION

Petitioner White Wing Development, Inc. ("White Wing") asks the Court to decide that a landowner has a Fifth Amendment right to a judicial remedy for final governmental action mandating compliance with a development regulation that does not substantially advance any legitimate state interest. The regulation applied to White Wing in this case fails the "substantial advancement" test by a wide margin. It requires use of a sewage disposal method that poses significant human health risk, even though the use of a safer treatment method would not have allowed White Wing to build any more units than the density limits of the general plan permitted. (See Appendix D to Petition at 15-22).

In its opposition to the petition, respondent County of Solano ("County") flagrantly mischaracterizes White Wing's constitutional claim as a "facial" challenge to County's adoption of the development regulation in 1980, rather than a challenge to County's specific application of the regulation to White Wing's property in 1995. As stated in White Wing's petition for certiorari, the question it presented to the California courts, and on which it seeks this Court's review, is whether "[County's] regulation as applied to the development of White Wing's property violates this Court's established standards under the Fifth and Fourteenth Amendments . . ." (Petition at 11; see *id.* at n.21). On that question, County effectively has presented no argument and has provided the Court with no cogent ground upon which to deny review.

Note: In all quoted material, footnotes are omitted and emphasis is ours unless otherwise stated.

ARGUMENT

A. WHITE WING HAS PRESENTED A RIPE AND TIMELY CHALLENGE TO COUNTY'S SEPTIC SYSTEM MANDATE AS APPLIED.

1. White Wing Has Challenged County's Specific Denial Of Any Residential Development That Does Not Rely On Septic Systems.

County's caricature of White Wing's taking claim as an untimely facial challenge is untenable. A "facial" challenge to a regulation asserts that it is unconstitutional in *every* application; an "as applied" challenge alleges that it is unconstitutional as applied to the claimant in the particular factual circumstances that give rise to the claim. *United States v. Salerno*, 481 U.S. 739, 745 and n.3 (1987); *Ada v. Guam Society of Obstetricians*, 506 U.S. 1011, 1012-1013 (1992) (Scalia and White, JJ., Rehnquist, C.J., dissenting from denial of petition for certiorari). White Wing has not alleged that County's septic system mandate is invalid in every application, but that its application to White Wing prevents White Wing, without substantial governmental justification, from developing its property in a manner otherwise permitted. Other landowners, not so constrained by County's application of the regulation, could make no such claim.[1]

As set forth in White Wing's Verified Petition (Appendix D to the Petition), as described by the California Court of Appeal, and as revealed by the record, the essential facts underpinning White Wing's claim are as follows: (1) White

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[1]These facts distinguish White Wing's case from *Yee v. City of Escondido*, 503 U.S. 519 (1992), relied on by County (Opposition to Petition for Certiorari at 9-11), where the plaintiffs had never sought relief from the rent control ordinance they attacked, and contended "that the ordinance does not 'substantially advance' a 'legitimate state interest' no matter how it is applied . . . ." 503 U.S. at 533-534.

Wing requested County in July 1995 to exempt its property from the strict application of County's septic system mandate by a general plan amendment; (2) County categorically and unconditionally denied the requested amendment; (3) White Wing filed a timely[2] petition for writ of mandate to review that decision; and (4) the California courts denied White Wing's petition on the grounds that application of the septic system mandate to White Wing's property substantially furthered legitimate state interests, and separation of powers principles barred judicial interference with County's decision.

The California Court of Appeal acknowledged that White Wing's first cause of action for writ of mandate was grounded upon the claim that "[County] exceeded the scope of its police power when it refused to amend the general plan to allow use of a central wastewater treatment facility." (Appendix A at 5). In dismissing that claim, the Court stated that (1) "by virtue of [the separation of powers] doctrine, courts generally lack the power to order legislative bodies to enact particular legislation" and (2) "when a land use restriction is challenged solely on the ground that it assertedly exceeds a municipality's authority under the police power, the restriction withstands constitutional attack if it is 'fairly debatable that the restriction in fact bears a reasonable relation to the general welfare.'" (*Id.* at 6, 8). County's attempt to relabel the latter holding as "dicta" (Opposition at 5 and 9 n.5), and its facile conclusion that "the state courts hearing this case declined to

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[2]County agrees that the applicable California statute of limitations is California Government Code § 65009(c)(1), which provided at the relevant time for commencement of an action within 120 days of the decision. White Wing filed its Verified Petition on August 20, 1995, 46 days after the Board of Supervisors' decision on July 5, 1995. (See Opposition at 7-8).

address Petitioner's constitutional takings claims" (*id.* at 10), is an exercise in fiction this Court should disregard.

The record is clear that White Wing sought a general plan amendment as a necessary prelude to residential development, that the proposed development relied on central wastewater treatment to achieve the density permitted under the West Central Solano County General Plan (one dwelling unit per two acres), and that White Wing could not achieve the permitted density with on-site septic systems. (See Petition at 6, 9 and n.16, 17).[3] The purpose of the amendment was not to "purchase an exemption from the statute of limitations" (cf. Opposition at 11), but to obtain exemption from the application of an unconstitutional development restriction by the only means available to White Wing under California law.[4]

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[3]County's opposition concedes these points (Opposition at 2 n.1, 3, 7); however, there is no record support for County's assertion (at 2 n.1) that "it is commonly assumed that, because of geologic and soil conditions, Petitioner's 1220-acre property could safely accommodate between 300 and 400 individual household septic systems." County's staff report stated only that the amendments would benefit White Wing by "overcoming the development limitation of the property's physical constraints which make on-site septic systems at minimum parcel size proposed infeasible . . . ." (See Brief of Amici Curiae to California Court of Appeal, Exhibit A at A-16).

[4]In California, any amendment to a local general plan requires legislative action by the local legislative body — County's Board of Supervisors in this case. Calif. Gov't Code §§ 65301.5, 65356. Such an amendment may be initiated by an affected landowner (Calif. Gov't Code § 65358), and the legislative body's action on the proposed amendment is expressly reviewable by petition for a writ of mandate under the California Code of Civil Procedure. Calif. Gov't Code § 65301.5.

2. White Wing's Challenge Fully Meets This Court's Requirements For Ripeness And Standing.

A landowner's claim that application of a development regulation effects a taking is ripe if "the government entity charged with implementing the regulation has reached a final decision regarding the application of the regulation to the property at issue." *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 186 (1985). To satisfy this requirement, a claimant must seek administrative relief from the regulation by a variance or other request for exemption. (*Id.* at 187-191).

County made clear, by its refusal to amend the general plan and the reasons it cited to justify that refusal (see Petition at 17-21), that it would not permit *any* development of White Wing s land that did not rely on individual, on-site septic systems. California law provides no procedure for obtaining a "variance" or "exemption" from the general plan, other than the amendment White Wing unsuccessfully pursued. County's opposition fails to identify any such procedure, and merely recycles under the heading of "ripeness" its contention that White Wing's purportedly "facial" challenge comes too late. (Opposition at 10-11).

County's contention that White Wing lacks standing is equally unfounded. As the Court just recently restated, standing requires that the plaintiff "demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of defendant, and that the injury will likely be redressed by a favorable decision." *Bennett v. Spear*, ____ U.S. ____, 65 U.S.L.W. 4201, 4203 (March 19, 1997.) Here White Wing has been injured by inability to develop its property in the manner that County's overall development regulations would otherwise permit, County's septic system mandate is the source of the injury, and (see Section B below) the injury can be redressed by a favorable

decision. White Wing therefore has standing here, as it did below.

County's discussion of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), totally distorts the Court's opinion in that case. The Court never suggested in *Lucas* that a landowner could not challenge the application of a development regulation to its property merely because the state had already enacted the regulation when the property was acquired.[5] The Court simply stated that all titles are taken (and held) subject to the "background principles of the State's law of property and nuisance . . . " 505 U.S. at 1029. There are no "background principles" of California real property law that dictate the use of a technologically-inferior, environmentally-destructive method of wastewater disposal, nor any that make it a "nuisance" to use a licensed, state-of-the-art treatment facility that overcomes these deficiencies.

B. WHITE WING'S CLAIM DOES NOT REQUIRE THE COURTS TO PERFORM A LEGISLATIVE FUNCTION IN VIOLATION OF THE SEPARATION OF POWERS.

The separation of powers doctrine at the state level poses no obstacle to this Court's enforcement of White Wing's Fifth and Fourteenth Amendment rights. " 'The Fourteenth Amendment . . . was avowedly directed against the power of the States,' and so permits a federal court to disestablish local government institutions that interfere with its commands . . . To hold otherwise would fail to take account of the obligations of local governments, under the Supremacy Clause, to fulfill the requirements that the Constitution

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[5] Among other things, such a bizarre principle would create an artificial hierarchy of Fifth Amendment rights among landowners, according to how long they had owned their respective properties.

imposes on them." *Missouri v. Jenkins*, 495 U.S. 33, 55, 57 (1990.)

Despite this Court's unquestioned authority to override state separation of powers where no alternative is available (see, *e.g.*, *Missouri v. Jenkins*, 495 U.S. at 57-58), White Wing's petition does not remotely demand the exercise of such authority. White Wing seeks only a determination that the allegations of its Verified Petition state a takings claim that must be considered on the merits by the California courts. White Wing does not ask the Court to prescribe the relief those courts should grant if its claim is upheld.

White Wing recognizes, however, that this Court would be understandably reluctant to order local courts to entertain claims for which they could not grant effective relief, and that "one of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local government institutions." *Missouri v. Jenkins*, 495 U.S. at 51. Accordingly, White Wing will demonstrate that the California courts can order effective relief upon holding that County's regulation effects a taking of White Wing's land, consistent with both this Court's Fifth Amendment jurisprudence and the separation of powers doctrine in California law.

Although California courts do lack authority to order a legislative body to enact specific legislation (*e.g.*, *Serrano v. Priest*, 18 Cal. 3d 728, 751, 135 Cal. Rptr. 345, 357 (1976))[6], that does not prevent those courts from remedy-

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[6] In *Serrano*, the California Supreme Court affirmed a lower court decree that invalidated the entire California public school financing system and set a deadline for legislative reform of the system. The Court held that the trial court had been "wholly cognizant of the well-established principle, rooted in the doctrine of separation of powers, that the courts may not order the Legislature or its members to enact or not to enact, or the Governor to sign or not to sign, specific legislation . . . " 18 Cal. 3d at 751, 135 Cal. Rptr. at 357.

ing action by a legislative body that deprives a party of its constitutional rights.[7] In this instance, County's failure to amend its general plan leaves White Wing subject to an unconstitutional law, with no further avenue for relief. To remedy that condition, the California courts can issue a writ of mandate that orders County to reconsider its decision, and take further action, in light of the judicial determination that the septic system mandate is unconstitutional as applied to White Wing.[8]

Such an order would simply "afford the state the opportunity to rescind the ordinance or regulation or to exempt the property from the allegedly invalid development restriction

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[7] *Mandel v. Myers*, 29 Cal. 3d 531, 174 Cal. Rptr. 841 (1981), illustrates the ability of California courts to uphold their constitutional determinations in the face of separation of powers limitations such as the legislature's exclusive authority to appropriate funds. In Mandel, the California Supreme Court affirmed a lower court judgment ordering a state official to pay an attorneys' fee award from a general departmental appropriation fund, despite the Legislature's deletion of a specific line item appropriation for payment of the award. The Court held that although "a court may neither directly compel the Legislature to appropriate funds nor order the payment of funds that have not been appropriated by the Legislature . . . *a variety of cases demonstrate that under some circumstances a court decision implementing constitutional rights may result in the expenditure of funds in a manner that the Legislature has not contemplated and yet pose no separation of powers problems whatsoever.*" 29 Cal. 3d at 539-540, 174 Cal. Rptr. at 846.

[8] As previously noted in the petition for certiorari (p. 24 at n.28), White Wing made clear to the California Court of Appeal that it sought only a "writ directing Respondents to set aside their decision and reconsider the matter [that] would not require Respondents to take any particular legislative action." White Wing did not forfeit its day in court on the substantive allegations of its Verified Petition, much less its Fifth Amendment rights, by initially seeking an overly broad form of relief. A pleading withstands general demurrer if it states a claim that entitles the pleader to *any* form of relief the court is empowered to grant. *E.g., Scott v. City of Indian Wells*, 6 Cal. 3d 541, 546, 549, 99 Cal. Rptr. 745, 748, 750 (1972).

once it has been judicially determined that the proposed application of the ordinance to the property will constitute a compensable taking." *Hensler v. City of Glendale*, 8 Cal. 4th 1, 13, 32 Cal. Rptr. 2d 244 (1994). It would no more compel County to enact specific legislation than a judicial determination that governmental action constitutes a taking compels the legislature to exercise its power of eminent domain. "Once a court determines that a taking has occurred, the government retains the whole range of options already available — amendment of the regulation, withdrawal of the invalidated regulation, or exercise of the power of eminent domain." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987).

In ordering County to eliminate the unconstitutional application of its septic system mandate to White Wing, the California courts would be performing a *judicial*, not a *legislative* function. The proper operation of our constitutional scheme requires the judiciary to exercise authority within its own sphere intended to influence, without directly controlling, the actions of the legislative branch. "Separation of powers . . . 'd[oes] not mean that these [three] departments ought to have no partial agency in or no controul over the acts of each other', but rather that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution, are subverted." *Mistretta v. United States*, 488 U.S. 361, 380-381 (1989), quoting Madison, The Federalist No. 47, pp. 325-326 (J. Cooke ed. 1961) (emphasis in original.) Far from threatening the independence of the legislative branch, the exercise of a court's equitable powers to rectify the deprivation of constitutional rights "lies at the heart of the constitutional theory of 'checks and balances' that the separation of powers doctrine is intended to serve." *Superior Court v. County of Mendocino*, 13 Cal. 4th 45, 52-53, 51 Cal. Rptr. 2d 837, 841-842 (1996.)

In summary, the California courts have demonstrated their ability to negate the effects of constitutionally invalid legislation without usurping legislative power. This Court can accordingly determine that White Wing has stated a claim for violation of its constitutional rights, and direct the California courts to proceed consistently with that determination, without requiring those courts to perform legislative functions in violation of the separation of powers.

CONCLUSION

White Wing's petition presents an important question under the holding of *Agins v. Tiburon*, 447 U.S. 255 (1980), that "the application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . ." *Id.* at 260. The California courts decided that question erroneously, and County's opposition provides no reason of substance why this Court should not exercise its plenary power to correct that decision.

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